IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,

Respondents.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1211

Rosebud Sioux Tribe,
Appellant-Plaintiff,

v.

Honorable Richard Kneip, et al.,
Appellee-Defendant.

Appeal from the United States District Court
for the District of South Dakota.

Submitted: April 11, 1975
Filed: July 16, 1975

Before GIBSON, Chief Judge, BRIGHT, Circuit Judge,
and TALBOT SMITH,* Senior District Judge.

TALBOT SMITH, Senior District Judge.

The complaint before us seeks that we declare that the original "boundaries of the [Rosebud Indian] reservation as fixed by the 1889 Act, were not affected by the three 'surplus' land statutes of 1904, 1907, and 1910."[1] It

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1]The Act of March 2, 1889, ch. 405, 25 Stat. 888, sometimes referred to as the "General Crooks" or the "Crooks" treaty,

[footnote continued]

follows, according to plaintiff's (hereinafter the Tribe's) theory that the areas involved, namely, all or parts of the Counties of Gregory, Tripp, Lyman and Mellette, in the State of South Dakota, remain a part of the Rosebud Reservation and are subject to the appropriate federal and tribal powers and jurisdiction.[2]

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established and described the Rosebud Reservation as follows:

> Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pike[sic] Creek; thence down White River to a point intersecting the west line of Gregory County extended north; thence south on said extended west line of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river.

Id., §2, 25 Stat. 888.

By the Act of April 23, 1904, ch. 1484, 33 Stat. 254 [hereinafter the 1904 Act], the Act of March 2, 1907, ch. 2536, 34 Stat. 1230 [hereinafter the 1907 Act] and the Act of May 30, 1910, ch. 260, 36 Stat. 448 [hereinafter the 1910 Act] Congress opened for homesteading and sale all unallotted lands within the original reservation and in Gregory County (1904 Act), in Tripp and Lyman Counties (1907 Act) and in Mellette County (1910 Act). Todd County remains unopened.

For prior history see, *inter alia*, the treaty agreeing upon the establishment of the Great Sioux Indian Reservation, ratified by Congress on February 16, 1869: Treaty with Different Tribes of Sioux Indians, April 29 *et seq.*, 1868, 15 Stat. 635; and the Dawes Act, *infra* note 112.

[2]*See generally* 18 U.S.C. §1151(a); Dept. of the Interior, *Federal Indian Law* 12-13 (1958); *DeCoteau v. District County Court*, 95 S. Ct. 1082, 1085-86 (1975).

As originally delimited the Rosebud Indian Reservation contained over 3 million acres. Three-fourths of this area, all the original reservation outside Todd County, South Dakota, is involved in this action. The three Acts we are asked to construe disposed of all lands in this area which were not allotted to the Indians.[3] Most of the unallotted lands were sold to homesteaders under the terms of the three Acts. About ninety percent of the present population in the disputed area is non-Indian.[4] The defendants Kneip and Mydland, the Governor and Attorney General of South Dakota, assert that the area involved was settled and developed by non-Indians in partial reliance upon the removal of their lands from the exterior boundaries of the reservation,[5] and that the Acts

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[3]Fifty-eight percent of the 2.4 million acres outside Todd County were unallotted lands. *See* GAO Report, 4 App. at 467, 469, 471-72.

[4]15,661 non-Indians and 1641 Indians reside in Gregory, Mellette and Tripp Counties. U.S. Bureau of the Census, Census of the Population: 1970; 1 *Characteristics of the Population* Pt. 43, South Dakota, at 91, 92 (1973). Figures are unavailable for the small fraction of Gregory County which lies outside the disputed area and the small fraction of Lyman County which lies within the disputed area.

[5]That since the opening of such disputed area for homesteading, at the time hereinbefore set forth, for more than fifty years the white settlers and their successor in interest, people of Indian Descent, whether enrolled or not enrolled as members of the Rosebud Sioux Tribe, and the Plaintiff itself, until the commencement of this action, had considered such Congressional authorization to homestead, removed such disputed area from the boundaries of the Rosebud Sioux Indian Reservation, and returned such land to the United States of America, who, upon the granting of homestead rights and the issuance of a patent to such land to a white settler, relinquished exclusive jurisdiction over such patented land and authorized the

[footnote continued]

in question were intended to and did effectuate the alteration of the reservation boundaries to exclude the areas therein opened for settlement.

The court below rejected the Tribe's tendered theories in support of its argument that the boundaries of the reservation as defined in the Act of March 2, 1889 had not been changed. It held that the surrounding circumstances and legislative history of the Acts made it clear that it was the congressional intent to separate each of the counties concerned and to extinguish the reservation status of those counties. *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D. S.D. 1974). We agree and we affirm.

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same to become an integral part of the State of South Dakota and the United States of America.

That no white person would have settled within, homesteaded, and applied and accepted a patent to land in the disputed area, were he to believe, or were he told at the time of so acting that his patented land remained within the boundaries of the Rosebud Sioux Indian Reservation, under the control of the Congress of the United States, any of its authorized agents, and any authorized tribal council or other governing body of the Rosebud Sioux Tribe.

* * *

As a result of such uniform and universal recognition that the disputed territory, settled by the whites, is a part of the State of South Dakota, and is excluded from the territorial boundaries of the Rosebud Sioux Indian Reservation, subsequent to homesteading and patenting, such disputed territory has been developed substantially through the energy, efforts, and moneys of such white settlers, their successors in interest, and the State of South Dakota and its political subdivisions, unaided by any effort of the Plaintiff.

Answer of Defendants Kneip and Mydland, 1 App. at 15-17.

In view of the many authorities cited to us, we deem it pertinent to note at the outset that they are of limited utility and we comment only on those deemed relevant to decision herein. Save as to broad generalities the holding in any particular case will depend upon circumstances applicable to that case, including among others, specific treaty or statutory provisions. Secretary Ickes, in his foreword to Cohen's *Handbook of Federal Indian Law*, speaks of "the complexity of the body of Indian law, based upon more than 4,000 treaties and statutes and upon thousands of judicial decisions and administrative rulings, rendered during a century and a half."[6] Obviously, separate treaties and agreements with separate tribes must be separately construed.

It is clear from the reported cases that, despite numerous differences in specific fact situations, the overriding judicial inquiry remains unchanged, namely, the congressional intent. Thus in *Seymour v. Superintendent*, 368 U.S. 351, 356 (1961), in holding that the 1906 Act of Congress there involved did not extinguish the Colville Indian Reservation, the Court relied repeatedly on materials from which it "seem[ed] clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) utilizes the same test for disestablishment, namely, "A congressional determination to terminate * * * expressed on the face of the Act or * * * clear from the surrounding circumstances and legislative history." We are aware of course,

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[6] Ickes, *Foreword* to F. Cohen, *Handbook of Federal Indian Law* v. (1942).

that much modern thinking respecting the culture and welfare of the Indians is at marked variance with that of the period we now survey, that around the turn of the century. But we do not sit to rewrite the legislation of decades past. We look to the congressional intent when it was written viewing the totality of the circumstances from the record in its entirety. The Tribe urges the lack of "express language extinguishing tribal title, or placing the land in the public domain, or altering the boundaries of the reservation." But here the Tribe misapprehends the applicable criteria.[7] Precise verbal formulae of extinguish-

[7]The Tribe overlooks, as well, the language of cession in the 1904 Act:

> cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota * * *.

1904 Act §1, 33 Stat. 256 (ratifying Article I of the 1901 Agreement). Such language could not be more "precisely suited" to relinquish all the Tribe's interest in the unallotted lands. *See DeCoteau v. District County Court*, 95 S. Ct. 1082, 1093 (1975) (hereinafter *DeCoteau*).

However, reliance may not ordinarily be placed upon dispositive terminology alone. Where we consider, as here, attempted legislative adjustment of contesting social forces the answer will not be found in the dictionary. It is settled that legislation of the general nature here under consideration is sufficiently ambiguous with respect to the effect on the boundaries of a reservation that the result in a particular case will depend upon its own facts. *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 689 (8th Cir. 1973); *see DeCoteau*, 95 S. Ct. at 1093; *Mattz v. Arnett*, 412 U.S. 481, 505 & n.23 (1973). Thus in *Condon, supra*, the court was not compelled to its conclusion, that the reservation's boundaries were not altered, by the superficial similarity of the legislation there at issue to those acts held not to have altered reservation boundaries in *Seymour v. Superintendent*, 368 U.S. 351 (1962) and *City of New Town v. United States*, 454 F.2d 121

[footnote continued]

ment or alteration of boundaries, however apt or helpful, are not a *sine qua non* of disestablishment. We seek, as we said, the congressional intent, which may be variously expressed.

Our guidelines were most recently stated in *DeCoteau v. District County Court*, 95 S. Ct. 1082, 1092-93 (1975) wherein it was held:

> This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278. The congressional intent must be clear, to overcome the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, at 174 quoting *Carpenter v. Shaw*, 280 U.S. 363, at 367. Accordingly, the Court requires that the "congressional determination to terminate . . . be expressed on the

(8th Cir. 1972). Despite the similarity in language, the court considered the matter a "close question" which it resolved against disestablishment only upon an analysis of the legislative history and surrounding circumstances that disclosed "[t]he Congressional intent underlying the 1908 Act with respect to the reservation's boundaries [to be] not clearly discernible * * *." *Condon, supra*, 478 F.2d at 687, 689.

Cases where the congressional intent "was that the reservation should continue to exist as such," *Seymour, supra*, p. 355, or *New Town, supra*, where the court was unable to find a congressional intent to disestablish are not, of course, inconsistent with the result we have reached. For (as will be fully developed herein), the defendants before us have demonstrated that a congressional determination to terminate lay behind each of the Acts in question.

face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412 U.S., at 505. See also *Seymour v. Superintendent,* 368 U.S. 351, and *United States v. Nice,* 241 U.S. 591. In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indian's benefit. *Mattz v. Arnett, supra,* and *Seymour v. Superintendent, supra.*

It is clear from *DeCoteau* that our inquiry may encompass all materials reasonably pertinent to the legislation,[8] including the debates thereon and official correspondence with respect thereto, and administrative treatment of the area;[9] as well as those bearing upon the historical context of its passage, such as the social forces then at work in the area and particularly the demands of our westward moving society arrayed against the con-

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[8]The Tribe has submitted, with the court's permission, the maps contained in the Annual Reports of the Commissioner of Indian Affairs for the years 1904-1912. We find these materials inconclusive and unpersuasive as to congressional intent. From 1904 to 1908 none of Gregory County was designated "Indian Reservation" on said maps. From 1909 to 1917 Tripp County and the portions of Gregory and Lyman Counties within the original reservation, and from 1912 to 1917 Mellette County, were designated "Opened" reservation. After 1918 all the disputed areas were designated "Former Indian Reservation." *Cf. DeCoteau,* 95 S. Ct. at 1092 n.27.

[9]*E.g.*, Letter from the Field Solicitor, Aberdeen, South Dakota, to the Director of the Aberdeen Area Office, Bureau of Indian Affairs, April 6, 1972, at 6, 4 App. at 478 expressing the opinion that "the legal boundaries of the Rosebud Indian Reservation have not been diminished or altered by Congress since the establishment of the original boundaries thereof * * *."

testing demands of the Indians for their culture and support.[10]

The original Rosebud Reservation was an area of great extent. Subsequent to its delineation, however, the "familiar forces" above noted came into operation. Gregory County, in particular, "had been anxious to acquire that portion of the Rosebud Reservation within its boundaries, ostensibly because the county government could not be maintained by the number of settlers on the small amount of non-reservation land available within it. After nearly two years, the county obtained the assistance of the very able congressional delegation from South Dakota, and under their direction the processes of acquisition were set in motion."[11]

Opposed to such acquisition, however, stood not only the reservation area as fixed under the 1889 Act but, indeed, the way of life of the Sioux:

> Over a vast tract of country the Teton Sioux ranged in historical times. The territory of Dakota, to which he gave the name of his nation, Dakota, –friends,– was his pasture and his hunting-ground, and he has been far removed from his allies and relatives, the Santees of the eastern bands, for many

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[10]*See DeCoteau,* 95 S. Ct. at 1086: "But familiar forces soon began to work upon the [Indian reservation there under examination]. A nearby and growing population of white farmers, merchants, and railroad men began urging authorities in Washington to open the Reservation to general settlement." The Supreme Court there quotes a letter of banker Diggs to the Secretary of the Interior asserting the presence of the reservation to be "a great detriment to our interest, as it blocks the progress of two or three lines of railroad that we are very anxious to see completed." *Id.* at 1086 n.8.

[11]Comment, *New Town Et Al.: The Future of an Illusion,* 18 S.D. L. Rev. 85, 88 (1973) (Footnote omitted).

years. By the right of might and pre-emption, the Sioux had a kingdom for his back yard and an empire for his pasture. For hundreds of miles he had a free hand, and knew no bound when he rode west through the buffalo grounds on the far side of the Missouri, until he stopped to reconnoitre the country of the Crows on the west, and the home of the Piegans, Bloods, and Blackfeet to the northwest.[12]

Obviously adjustments between these competing forces had to be made. It was Inspector McLaughlin who was assigned the first step in the desired acquisition of Gregory County, that of reaching agreement with the Sioux. He describes his mission, and its attainment, in the following terms:

> Three years later [in 1901] I went to these same Indians with a proposition involving an agreement for the cession of a great body of land that was required for settlement by the whites. The land lay in Gregory County, South Dakota, and there were about four hundred and sixteen thousand acres in the tract. The deal was a big one, and there were many big talks. The Indian had come to a proper appreciation of the value of his holdings, and the government had not yet taken the position that there should be no appropriation for the purchase of the lands needed, that the government would only take over the lands and dispose of them to settlers, holding the funds in trust for the Indians, but guaranteeing nothing, except that there would be a fixed price per acre charged to the settlers. The

[12]J. McLaughlin, *My Friend the Indian* 263-64 (1910). The author, James McLaughlin, was United States Indian Inspector for the Department of the Interior, serving in such capacity for many years. He is the Inspector McLaughlin who is referred to in the briefs before us and who will be quoted by us hereinafter.

> Rosebuds did not like the deal, and it was a case where I had to use personal influence to bring the agreement about. The people of South Dakota were very anxious to open the lands, and the rush to Bonesteel and the surrounding country resulting from this cession is still remembered. I talked to the chiefs and head men. I was well known to them, and they had confidence that I would not do anything that was opposed to their interest. But they were not easily moved. I made the agreement finally, securing the signatures to it September 14. The amount of money to be received by the Indians, under the terms of the sale, was $1,040,000.[13]

The Rosebud Reservation was one of the smaller reservations[14] which had been carved out of the Great Sioux Reservation by the Act of March 2, 1889.[15] Section 12 of this Act provides:

> Sec. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which said reservation is held of such portions of its reservation not allotted as such tribe shall, from time to time,

[13]*Id.* at 309.

[14]Another of these was the Pine Ridge Reservation, the boundaries of which were held, in *United States ex rel. Cook v. Parkinson*, No. Civ. 74-4023 (D. S.D. April 21, 1975) to have been diminished by the Act of May 27, 1910, ch. 257, 36 Stat. 440, removing Bennett County therefrom.

[15]Act of March 2, 1889, ch. 405, 25 Stat. 888, often referred to in the literature as the "General Crooks" or the "Crooks" treaty.

> consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress: *Provided, however,* That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States by an Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers, and shall be disposed of by the United States to actual and bona-fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education * * *.

25 Stat. 892.

Inspector McLaughlin, in early 1901, proceeded to the Reservation to undertake negotiations with the Indians. As he explained it to them on September 5, 1901:

> I am here under orders of the Secretary of the Interior, who was authorized by Congress, at its last session, to negotiate, through any Indian inspector, with any Indian tribes for the cession of their surplus lands, and he has sent me here to negotiate with you for your surplus lands in Gregory County, that is, for all of your lands in Gregory County that have not been allotted to Indians. * * *
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> * * * *
>
> *The cession of Gregory County will leave your reservation a compact, and almost square track, and would leave your reservation about the size and area of Pine Ridge reservation.* [16]

[16] *Proceedings of a Council with the Indians of Rosebud Reservation, September 5, 1901,* in S. Doc. No. 31, 57th Cong., 1st Sess. 12 (1901), 2 App. at 18 (Emphasis added).

Similar representations were made to other groups of Indians. Thus on April 13 to the Ponca Creek District of the Rosebud Reservation:

> My friends, I have called to see you to-day for the purpose of ascertaining whether or not you are willing to sell the unallotted lands in Gregory County to the Government. * * * You doubtless know that there has been considerable talk for the past two years of negotiating with you people *for this corner of the reservation.* * * *
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> * * * *
>
> In negotiating with Indians for tracts of land, a portion of which has been allotted to them, the privilege has been given the Indians to elect whether they shall remain upon their allotments or *relinquish their allotments and remove to the reservation.* I do not think that it is for the best interest of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the best lands of this county, and it is very doubtful if you could find as good land anywhere within the *diminished reservation* for the reason that the best lands have all been allotted.
>
> * * * *
>
> ** * * If you dispose of this surplus land it will leave you about the same sized reservation as the Pine Ridge Indians have.* * * *
>
> * * * *
>
> ** * * By disposing of this little corner of the reservation, it would leave you a nice, square reservation,* and the proceeds of the sale would benefit you very much.[17]

[17] *Proceedings of a Council with the Indians of the Ponca Creek District, Rosebud Reservation, April 13, 1901,* in S. Doc. No. 31, 57th Cong., 1st Sess. 8-10 (1901), 2 App. at 16-17 (Emphasis added).

Likewise to the Indians of the Big White River District on April 15, 1901:

> Every person would have the privilege of remaining on the land that has been allotted to him, *or of relinquishing it and removing to the diminished reservation,* but I would advise you who have selected tracts of land to remain upon your allotments in case of the cession of this land to the Government.[18]

Response, in part, was made by Ralph Eagle Feather in the following terms:

> We Indians intend to own the land, and have taken it in allotments, just as the President said to take it. We want payment for all vacant land left after that. After that the Indians of future generations can live upon the land and own it—that is, the lands within the *diminished reservation,* in case Gregory County should be ceded.[19]

Upon such representations and with such understandings, agreement was reached, on September 14, 1901, with the required three-fourths adult male Indians.[20] The agreement provided in substance for a

[18] *Proceedings of a Council with the Indians of the Big White River District, Rosebud Reservation, April 15, 1901,* in S. Doc. No. 31, 57th Cong., 1st Sess. 11 (1901), 2 App. at 17 (Emphasis added).

[19] *Proceedings of a Council with the Indians of Rosebud Reservation, September 5, 1901,* in S. Doc. No. 31, 57th Cong., 1st Sess. 21 (1901), 2 App. at 22 (Emphasis added).

[20] The Treaty with Different Tribes of Sioux Indians, April 29 *et seq.*, 1868, 15 Stat. 635, which established the Great Sioux Reservation, required, for cession of any portion of the reservation, execution and signature by at least three-fourths of all the adult male Indians occupying or interested in the same. *Id.*, Art. XII, 15 Stat. 639.

cession of unallotted land within Gregory County in return for a lump-sum payment by the Government.[21]

[21] This agreement made and entered into on the fourteenth day of September, nineteen hundred and one, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Sioux tribe of Indians belonging on the Rosebud Reservation, in the State of South Dakota, witnesseth:

> ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: * * *.
>
> ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement the United States stipulates and agrees to expend for and pay to said Indians, in the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars.
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> * * * *
>
> ARTICLE V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.
>
> ARTICLE VI. This agreement shall take effect and be in force when signed by U.S. Indian Inspector James McLaughlin and by three-fourths of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.
>
> * * * *

The full text of the 1901 Agreement appears in the preamble to the 1904 Act, 33 Stat. 254-55.

We do not take the word "benefits" in Article V to have a fixed meaning applicable to all its uses. Here the original Agreement which the Tribe concedes would have "extinguished"

[footnote continued]

The language employed, "cede, surrender, grant and convey" leaves no doubt as to its meaning. There is a complete relinquishment of right, title, and claim. "It would be impossible," we have held of the words "ceded, conveyed, transferred, relinquished and surrendered," "to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal."[22] So here. In fact the Tribe concedes that had the Congress adopted a bill simply ratifying the Agreement, "Indian title to the 'surplus' land would have been extinguished."

The negotiated Agreement, however, was never ratified.[23] The problem in the Congress was not jurisdiction, title, or boundaries. It was, simply put, money. The problem was first put thus by Senator Platt, who proposed to abandon the "free-homes" policy:

> * * * It is true that several years ago—more than ten years ago, I think—in opening Indian reservations, we paid large and extravagant prices for land

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Indian title had it been ratified, as well as the 1904 Act itself, provided that the Agreement should not deprive the Rosebud Indians of any "benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement." Since one of the "provisions of this agreement" was the cession of Gregory County, we cannot accept the Tribe's argument that consistently with the agreement it nevertheless remained entitled to a fixed boundary including Gregory County.

[22] *United States v. Myers*, 206 F. 387, 392 (8th Cir., 1913); See note 7 *supra*.

[23] In 1902 a ratification bill passed the Senate and was reported favorably in the House. 35 Cong. Rec. 5024 (1902) (S. 2992 passes Senate); H. R. Rep. No. 2099, 57th Cong., 1st Sess. (1902) (to accompany S. 2992). Because of the problem discussed below, the bill was never given consideration on the floor of the House. *See* text accompanying note 25, *infra*.

> to the Indians, upon the theory that the Government was going to be reimbursed for its expenditures by the settlers paying for the land which they settled upon a sufficient sum to reimburse the Government. That went on for years, and everybody supposed that that was acceptable to the settlers. Then the settlers began to agitate that the Government should remit to them the obligation which they had incurred to pay for the land, and thereby reimburse the Government; and the history of that agitation of course is well known. The Government remitted about $35,000,000 which it had paid to the Indians and which the settlers had agreed to repay to the Government by the passage of that free-homes bill.

35 Cong. Rec. 3188 (1902).

Further discussion in the same vein is found in 35 Cong. Rec. 4801-02 (1902):

> [Mr. PLATT.] This is a bill for the opening of the Rosebud Reservation in South Dakota. I do not remember at this time the exact number of acres which are thus to be opened by the bill, but the price to be paid to the Indians is something over a million dollars. *The question is whether the Government, in opening the lands to settlement, shall give the lands thus purchased from the Indians to the settlers under the homestead law, or whether it shall require the settlers who take up these lands under the homestead law to pay for them a sum per acre equivalent to what the Government pays the Indians for them.* In other words, in opening the Indian reservations which already remain, what is to be the policy of the Government? Are we to pay the Indians a high price for the lands which we obtain a cession of, and then give those lands to settlers free of cost, or shall we require the settlers to pay as

much for the lands as will make up wholly for the amount which we have paid for them? That is the question, and Senators will see that it is a far-reaching question. [Emphasis added.]

* * * *

Now, the pressure for the opening of this land is great. I do not think anyone who does not live in the vicinity of those reservations understands how great it is. * * *

* * * *

Now, this particular agreement comes here to be ratified upon a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become a part of the public domain. The Indians in negotiating said that was not a fair price for the lands and they were worth a great deal more, but finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation—to pass ordinarily without any particular examination or any thought of the consequences to the Government in the matter of expense. I will not go into the history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage which is to be brought under the public domain by cession to the United States.

The bill proposes that the land thus acquired shall be open to homestead settlement without requiring any payment for the land settled upon from the settler. My amendment proposes that the settler shall pay $2.50 an acre, being the same which the Government has agreed to pay to the Indians, and that thus the Government shall be reimbursed for the amount expended for the purchase.

Senator Clapp opposed the Platt amendment, stating in part:

> Here is this reservation in South Dakota. Of course the Senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and extinguishing the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily and inherently worth so much an acre [to settlers].

35 Cong. Rec. 4807 (1902).

Although the Platt amendment was defeated in the Senate,[24] the ratification bill languished in the House "because of the fact that it provided that the Government should pay for the lands outright."[25] New bills were introduced and reported from committee in both chambers which proposed "to adopt a new policy in acquiring lands from the Indians [by] providing that the lands shall be disposed of to settlers * * *, and to be paid for by the settlers, and the money to be paid to the Indians only as it is received * * * from the settlers."[26] The Senate bill passed but the 57th Congress expired before the House could give it consideration.[27]

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[24] 35 Cong. Rec. 4971 (1902).

[25] 38 Cong. Rec. 1423 (1904) (remarks of Congressman Burke). *See* S. Rep. No. 3271, 57th Cong., 2d Sess. 2 (1903); 36 Cong. Rec. 2748 (1903) (remarks of Senator Gamble).

[26] H. R. Rep. No. 3839, 57th Cong., 2d Sess. 1-2 (1903) (to accompany H. R. 17467); S. Rep. No. 3271, 57th Cong., 2d Sess. 2 (1903) (to accompany S. 7390) (quoting House Report).

[27] 36 Cong. Rec. 2748 (1903) (S. 7390 passes Senate).

Thereafter, in June 1903, Inspector McLaughlin was instructed to return to the reservation to negotiate a new agreement in light of the "new departure" proposed by the latest Senate bill.[28] He explained the changes to the Tribe in the following terms:

> My friends, I am very glad to meet you today. I have been sent here by the Secretary of the Interior

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[28]Letter from the Commissioner of Indian Affairs to James McLaughlin, U.S. Indian Inspector, June 30, 1903, at 1-2, 5, 7, 2 App. at 62-63, 66, 68:

> In a joint request to the Department dated April 4, 1903, the members of the South Dakota delegation in Congress, Senators Gamble and Kittredge and Representatives Burke and Martin, asked that an Inspector be detailed to proceed to the Rosebud Indian reservation, in South Dakota, for the purpose of negotiating a new agreement with the Indians thereof for the cession of the unallotted portion of their reserve embraced in Gregory County, along the lines proposed in Senate Bill No. 7390, 57th Congress. * * *
>
> The essential features of said S. 7390, with which you are already familiar, are as follows:
>
> (1) That instead of paying the Indians the lump sum of $1,040,000 for the surplus Gregory County lands as provided in the agreement of September 14, 1901, the lands be disposed of to settlers under the provisions of the homestead and town-site laws, excepting sections 16 and 36 or the equivalent thereof, at not less than $2.50 per acre, the proceeds arising from such sale to be paid to the Indians.
>
> * * * *
>
> * * * The method proposed for disposing of these lands is a new departure, and it is therefore specially desirable that the matter should be thoroughly understood by the Indians before they enter into an agreement along the lines proposed * * *.
>
> * * * *

[footnote continued]

> to present to you a modification of the agreement we entered into two years ago, for your unallotted Gregory County lands.[29]
>
> There has been a sentiment growing in Congress for a number of years past, and is now stronger than ever, against paying Indians for ceded lands direct from the U.S. Treasury. This is what is referred to in my letter of instructions, which I read you, as being a new departure in the manner of disposing of the surplus lands of Indian reservations, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands; they will be paid from the proceeds of the sale of lands ceded; the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such a manner as will secure to the Indians the highest price obtainable. This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made

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> It is not deemed necessary herein to give you any definite instructions as to the form of the agreement and the manner of its execution inasmuch as you are thoroughly familiar with these features of the subject. Attention is invited in this connection, however, to Departmental instructions to you dated March 21, 1901, in connection with the negotiation of the former agreement.

The names of Charles H. Burke and Robert J. Gamble appear frequently in the documentation of the period. Mr. Burke was Congressman from South Dakota for many years, later serving as Commissioner of Indian Affairs. Mr. Gamble was Senator from South Dakota from 1900 to 1912. Comment, *New Town Et Al.: The Future of An Illusion*, 18 S.D. L. Rev. 85, 88 n.9 (1973).

[29]*Minutes of Council held at Rosebud Agency, S.D. with the Sioux Indians belonging on the Rosebud Reservation* at 1, 2 App. at 70 (July 24, 1903).

with Indians, by which they will receive a lump sum consideration for the tract ceded, but only what the Government is able to realize from the sale of the lands.[30]

* * * I am here to try to enter into a new agreement, from which you will receive as for your lands as the agreement of two years ago provided, but the manner of disposing of it is different. * * *

* * * *

* * * The Government collects from the homesteader and pays it over to you.[31]

* * * *I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment* * * *. * * * *You will still have as large a reservation as Pine Ridge after this is cut off.*[32]

* * * The agreement which I submit for your consideration is similar in every respect to that of two years ago, except you will have to wait for the sale of the land to receive your money * * *.[33]

* * * The [congressional] objections to the former agreement was not on account of the price, but to the manner of payment.[34]

Inspector McLaughlin succeeded in obtaining a majority (though not three-fourths) consent to the new method of payment, provided that the price to homesteaders be raised from $2.50 to $2.75 per acre.[35] Within

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[30] *Id.* at 5, 2 App. at 74 (July 25, 1903).

[31] *Id.* at 12, 2 App. at 81 (July 29, 1903).

[32] *Id.* at 21-22, 2 App. at 90-91 (July 30, 1903) (Emphasis added).

[33] *Id.* at 37, 2 App. at 106 (August 8, 1903).

[34] *Id.* at 50, 2 App. at 119 (August 10, 1903).

[35] Agreement of August 10, 1903, 2 App. at 120-26.

nine months Congress passed a ratification bill which amended the 1901 Agreement solely with respect to the method of payment.[36] As a substitute for the lump-sum payment by the United States,[37] the 1904 Act provided that the Government would receive funds from the settlers as trustee for the Indians.[38] Homesteaders were

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[36] Act of April 23, 1904, ch. 1484, 33 Stat. 254.

[37] 1901 Agreement, Art. II, *supra* note 21.

[38] Article II of the 1901 Agreement was amended to read as follows:

> "ART. II. In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and town-site laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre."

1904 Act §1, 33 Stat. 256.

Section 6 of the 1904 Act provides:

> That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein; or to guarantee to find purchasers for said lands, or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

33 Stat. 258.

These provisions are substantially identical to terms contained in the 1903 Agreement. Agreement of August 10, 1903, Arts. II, VI, 2 App. at 120-21, 23.

to pay substantially higher prices than those provided in the 1903 Agreement,[39] to insure that the Indians would receive as much under the new method as provided in the 1901 Agreement.[40]

The Tribe stresses to us the lack of a three-fourths majority Indian consent to the 1904 Act (as well as the 1907 and 1910 Acts), referring at times to "unilateral" actions by the Congress. It should be noted, in this regard, however, that in January, 1903 the Supreme Court decided *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The case concerned the validity of a cession of tribal lands enacted in contravention of a treaty requiring three-fourths Indian consent. The Court held:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith toward the Indians. * * *

[39]Four dollars per acre for lands entered within the first three months, three dollars per acre for lands entered during the second three months, and two dollars and fifty cents per acre for lands entered thereafter. 1904 Act §2, 33 Stat. 257-58.

[40]*See* 38 Cong. Rec. 1423 (1904) (remarks of Congressman Burke).

> * * * *
>
> * * * In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurer to the bill was therefore rightly sustained.

187 U.S. at 566, 568 (Emphasis in original).

The effects of this decision, we note, were explained to the Indians by Inspector McLaughlin in 1903, 1906, and 1909.[41] Consequently, it was clear that the vote of three-fourths of the adult male Indian population was no longer required as consent to cession of any portion of the Rosebud Reservation.[42]

The 1904 Act, incorporating the entire text of the 1901 Agreement (save for the lump-sum provision) passed under the circumstances detailed in part heretofore, was obviously an outgrowth of and a continuation of the objectives of the 1901 Agreement. The terminology employed, language of diminution and extinguishment, was used interchangeably with respect both to

[41]*Minutes of a Council held at Rosebud Agency, S.D. with the Sioux Indians belonging on the Rosebud Reservation* at 5-6, 2 App. at 74-75 (July 25, 1903); at 11, 2 App. at 80 (July 29, 1903); at 23-24, 2 App. at 92-93 (July 30, 1903). *Proceedings of a Council held at Rosebud Agency, S.D. with the Indians of the Rosebud Reservation, December 14, 1906* at 10, 35, 3 App. at 185, 210. *Proceedings of a Council held with the Indians of the Rosebud Agency, April 21, 1909* at 4, 13, 15-16, 3 App. at 304, 313, 315-16.

[42]See note 20 *supra*.

the proposed ratification of the 1901 Agreement and the passage of the 1904 Act.[43] Nowhere do we find, in the legislative history or materials from the period, any indication in substantial support of the claim now made by the Tribe that the exterior boundaries of the Reservation were to be left undisturbed despite the cession of the County of Gregory. The point at issue was method of payment for the land. Such was the subject of the extended discussion and debate. As for the reservation land itself, Gregory County was to be thrown open to settlers, and the reservation *pro tanto* extinguished. It is significant that from the inception of the negotiations preceding the original agreement reached, through those undertaken by Inspector McLaughlin upon his return with the proposed amendment, the parties were negotiating in terms that left no doubt that actual diminution was involved. The above-quoted language, "[y]ou will still have as large a reservation as Pine Ridge after this is cut off," "negotiating with you [Indians] for this corner of the reservation," "relinquish their allotments and remove to the reservation," "the diminished reservation," "leave you a nice, square reservation" "removing to the diminished reservation," "disposing of this little corner of the reservation" and "leave your reservation a compact, and almost square tract * * * about the size and area of the Pine Ridge reservation," admits of no other conclusion.

Whatever question there may be as to the proper interpretation of "diminished," that is, whether it means diminution by the carving out of a described area with concomitant change of boundaries, or a diminution by sale of lots to non-Indians without changing the bound-

[43] *See* 35 Cong. Rec. 4807 (1902) (remarks of Senator Clapp) *supra* at 18; H. R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904) and S. Rep. No. 651, 58th Cong., 2d Sess. 3 (1904) (quoting House Report) *infra* at 33.

aries,[44] upon the facts before us it is clear that the parties contemplated a carving out process. Such descriptions of the effect of the negotiations, found in both pre-agreement and post-agreement materials as we have cited above, are persuasive as to intent. We observe, moreover, in this regard, the Supreme Court's recent and like employment of the term "diminished reservation" as involving a necessary and corresponding adjustment of reservation boundaries in a carving-out situation:

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than simply a major portion of, the affected Tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the Tribe wished to retain its former Reservation, undiminished, but rather because the Tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for Tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. §1151(c). See *United States v. Pelican*, 232 U.S. 442. With the benefit of hindsight, it may be argued that the Tribe and the Government would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments. But we cannot rewrite the 1889 Agreement and the 1891 statute.

DeCoteau, supra, 95 S. Ct. at 1094.

The Court's suggestion that the parties "would have been better advised to have carved out a diminished reservation, instead of or in addition to the retained allotments" is particularly appropriate to the facts before

[44] *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687 (8th Cir. 1973).

us in view of the 1904 Act under which, from the Tribe's original reservation, "all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County" was ceded, granted and conveyed to the United States,[45] clearly thus having "carved out a diminished reservation," leaving the Tribe with an "almost square tract," with necessarily altered boundaries.

The school lands provision of the 1904 Act is also relied upon by the defendants as showing congressional intent to disestablish Gregory County. The argument, applicable as well to the 1907 and 1910 Acts, *infra*, stems from the provisions of the Act of February 22, 1889, ch. 180, 25 Stat. 676, admitting the Dakotas into the Union. In pertinent part the Act provides as follows:

> An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, *and to make donations of public lands to such States.*
>
> * * * *
>
> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States * * * are hereby granted to said States for the support of common schools, * * *: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants * * * of this act, *nor shall any lands embraced in Indian,*

[45]1904 Act §1, 33 Stat. 256 (ratifying Article I of the 1901 Agreement).

> military, or other *reservations* of any character *be subject to the grants * * * of this act until the reservation shall have been extinguished* and such lands be restored to, and become a part of, the public domain.

25 Stat. 676, 679 (Emphasis added).

Section 4 of the 1904 Act provides in part:

> That sections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose * * *.

33 Stat. 258. The provision may be traced to a Senate committee amendment to the original ratification bill.[46] As Senator Gamble explained the amendment:

> Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain. This would withdraw about 29,000 acres of these lands and would leave 387,000 acres to be opened to settlement, and which would be affected by the proposed amendment.

35 Cong. Rec. 3187 (1902).

Similarly, in a colloquy between Congressman Finley and Congressman Burke, like explanation was made:

[46]S. Rep. No. 662, 57th Cong., 1st Sess. 1 (1902).

Mr. FINLEY. Mr. Speaker, I observe that in section 4, reserving school lands, it is provided that the Government pay for those lands. Is that the usual appropriation that is put in all bills of this character?

Mr. BURKE. I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain. That enabling act was passed by Congress on the 22d day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay outright of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the treaty.

38 Cong. Rec. 1423 (1904). Further explanations of similar tenor will be found in both House and Senate reports.[47]

In the light of the above there can be no reasonable doubt that it was the congressional intent to extinguish the reservation in Gregory County. The Tribe argues that the school lands grant in the South Dakota enabling act

[47]H. R. Rep. No. 443, 58th Cong., 2d Sess. 2 (1904); S. Rep. No. 651, 58th Cong., 2d Sess. 2 (1904). *See* S. Rep. No. 3271, 57th Cong., 2d Sess. 2 (1903); H. R. Rep. No. 3839, 57th Cong., 2d Sess. 2 (1903); S. Rep. No. 662, 57th Cong., 1st Sess. 1, 2 (1902).

would operate automatically upon the extinguishment of a reservation and that since Congress thought it necessary in the 1904 Act to grant school lands to South Dakota, the reservation must not have been extinguished. But we cannot ignore the legislative history outlined above from which it is clear that Congress included the provision to implement the grant in the enabling act and for no other reason. Thus the action of Congress in passing section 4 of the 1904 Act was premised solely upon an understanding that the reservation would be extinguished, and is persuasive that such is the effect of the Act.[48]

The argument of the Tribe that under the 1904 Act, as well as the 1907 and 1910 Acts, the Indian title to the lands "was not extinguished" rests in part upon the theory that under such Acts "the United States acted as trustee to dispose of the land and credit the proceeds to the Tribe." Thus, it is argued, Tribal title to the land was not extinguished, the Rosebud Reservation was not reduced by the said Acts, and the boundaries thereof were not altered.

The argument made will not withstand analysis in the light of the realities of the situation confronting the Congress at the time. The land was needed for settlement. The problem, as we have noted, involved payment therefor. It could be paid from the Treasury in a lump-sum as in *DeCoteau, supra,* where, after some per capita distribution, the balance was placed in trust,[49] or

[48]Nothing said in *DeCoteau* relative to school lands suggests a contrary conclusion. *See DeCoteau,* 95 S. Ct. at 1093-94 n.33.

[49]As passed by the Congress, the 1891 Act recited and ratified the 1889 Agreement with the Tribe and appropriated $2,203,000 to pay the Tribe for the ceded land and to make good the Tribe's "loyal scout" claim. §27, 26 Stat. 1038. A portion of the moneys

[footnote continued]

it could be placed in trust as received from the settler-purchasers, as here.[50] Judge Bogue, in the *Cook* case, employs the apt terminology of "certain-sum-in-trust" method as opposed to "uncertain-sum-in-trust."[51] Obviously, the Indians retain certain beneficial rights in both cases. If authority is needed therefor it is supplied by the *Ash Sheep* case.[52] But the fact that a beneficial

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was made available for immediate distribution to Tribal members on a per capita basis, and the remaining funds were, as had been agreed, "placed in the Treasury of the United States, to the credit of said . . . Indians [at five percent interest] . . . for the education and civilization of said bands of Indians or members thereof." §27, 26 Stat. 1039.

DeCoteau, 95 S. Ct. at 1091.

[50]1904 Act §1, 33 Stat. 256-57 (amending Article III of the 1901 Agreement).

[51]*United States ex rel. Cook v. Parkinson*, No. Civ. 74-4023 (D. S.D. April 21, 1975), slip op. at 57.

[52]*Ash Sheep Co. v. United States*, 252 U.S. 159 (1920) involved the status of land on the Crow Reservation in Montana subsequent to a cession agreement made, but prior to the opening of the land for settlement or entry. The agreement, "in terms, 'ceded, granted, and relinquished' to the United States all of their 'right, title and interest,' " under a trust relationship substantially identical to that in the instant case. 252 U.S. at 164, 165-66. The Court held in part that under these facts:

> until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. * * * They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, * * * Thus, we conclude, that the lands described in the bill were "Indian lands" when the company pastured its sheep upon them * * *.

252 U.S. at 166.

interest is retained does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries. The determination of disestablishment as we stated at the outset, rests upon congressional intent, as to which the method of payment, whether lump-sum or otherwise, is but one of many factors to be considered. Thus it was that the trust involved in *DeCoteau* had no more conclusive effect than the one here under consideration.

It was our holding in *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687 (8th Cir. 1973), which we here reiterate, that the changed method of payment above described " 'was simply a new method utilized by a Congress that no longer favored purchasing Indian lands and providing them free of cost to settlers.' " What had happened was simply that the Congress was through with purchasing Indian lands at great cost and providing them free to settlers. Thereafter the settlers would have to pay their way. The purchase money would inure to the benefit of the Indians, of course, and be held in trust for them, but the record is barren of any disclosed intention thereby to preserve intact the area of the original reservation and its boundaries. Such an intention is utterly foreign to the entire tenor of the contemporary materials before us. The land was being thrown open for farming. The settlers were emigrating in great numbers to the new land in the West, buying their farms and planting their crops. The Indian reservations were being eroded, not preserved. The final reports on the 1904 Act leave no doubt as to the congressional meaning and intent:

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and *is really only a corner of*

> *the reservation, which will be left compact and in a square tract* and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota.[53]

Our conclusions with respect to Gregory County are further supported by subsequent developments which culminated in the passage of the 1907 and 1910 Acts, to a consideration of which we will now proceed.[54]

The forces at work for the opening of the Indian lands were not made quiescent by the Gregory cession. By 1906 the pressures for the opening of additional Indian lands in South Dakota were again being felt in the Congress. Responsive thereto, in early December, 1906, Senator Gamble and Congressman Burke, both of South Dakota, introduced separate bills providing for the opening of Tripp County.[55] Inspector McLaughlin was once again instructed to "enter into negotiations with the Rosebud Indians for the cession of the surplus unallotted land in Tripp County, South Dakota." The instructions continued, "You are familiar with the situation there and

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[53]H. R. Rep. No. 443, 58th Cong., 2d Sess. 3 (1904) (Emphasis added) and S. Rep. No. 651, 58th Cong., 2d Sess. 3 (1904) (Emphasis added) (quoting House Report).

[54]Congressional action with reference to Gregory County shortly after the passage of the 1904 Act also confirms the conclusions. By the Act of February 7, 1905, ch. 545, 33 Stat. 700 Congress granted settlers an extension of time in which to establish their residence upon the opened Gregory County lands. The title and the body of the Act contain the following language:

> lands which were *heretofore* a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota.

33 Stat. 700 (Emphasis added). *See* S. Rep. No. 2760, 58th Cong., 3d Sess. 1 (1905); H. R. Rep. No. 4198, 58th Cong., 3d Sess. 1 (1905); 39 Cong. Rec. 1578 (1905) (remarks of Senator Gamble).

[55]41 Cong. Rec. 15 (1906) (Burke bill, H.R. 20547); 41 Cong. Rec. 50-51 (1906) (Gamble bill, S. 6618).

for this reason it is not deemed necessary to give instructions in detail for conducting the negotiations. * * * The following would seem to be fair terms, similar to those in the disposal of the ceded lands in Gregory County, S.D. * * *."[56] Committee action on the bills was delayed pending the outcome of the negotiations,[57] which were conducted by the Inspector at Rosebud Agency on December 14, 15, 19 and 20, 1906 and again on January 17, 18 and 21, 1907.[58] The bill introduced by Congressman Burke formed the framework of the discussions.[59] To its proposals the Indians drafted counter proposals, providing, *inter alia,* for higher prices to homesteaders and for the accumulation of proceeds in an interest bearing fund.[60] A final agreement was reached January 21, 1907 and was ultimately signed by a majority (though not three-fourths) of the eligible Indians.[61]

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[56]Letter from F.E. Luepp, Commissioner of Indian Affairs to Inspector James McLaughlin, December 5, 1906 at 1, 2-3, 5; 3 App. at 166, 167-68, 170.

[57]41 Cong. Rec. 3182 (1907) (remarks of Senator Gamble); Letter from E. A. Hitchcock, Secretary of the Interior, to Chairman Committee on Indian Affairs, House of Representatives, February 14, 1907, in H.R. Rep. No. 7613, 59th Cong., 2d Sess. 4 (1907).

[58]*Proceedings of a Council held at Rosebud Agency, S.D. with the Indians of the Rosebud Reservation, December 14, 1906,* 3 App. at 176-269.

[59]*Id.* at 2-3, 11, 12; 3 App. at 177-78, 186, 187.

[60]*E.g., id.* at 43-47, 49; 3 App. at 218-22, 224.

[61]Letter from James McLaughlin to the Secretary of the Interior, February 12, 1907 at 1, 4, 3 App. at 270, 273; Letter from E. A. Hitchcock, Secretary of the Interior, to the Chairman Committee on Indian Affairs, House of Representatives, February 14, 1907 (enclosing agreement) in H.R. Rep. No. 7613, 59th Cong., 2d Sess. 5, 7 (1907).

Article I of the 1907 Agreement provides that the Indians,

> for the consideration herein named and in the manner hereinafter provided, do hereby cede, grant, and relinquish to the United States all claim, right, title and interest in and to all that part of the Rosebud Indian Reservation lying South of Big White River and east of range twenty-five west, of the sixth principal meridian in South Dakota, except such portions thereof as have been, or may hereafter be, allotted to Indians * * *.[62]

The United States was to purchase the school lands outright, and to act as trustee for the sale of the remaining lands to homesteaders at specified prices.[63] Provision was made for completing and changing the allotments to Indians, and for the deposition of the proceeds (including accumulation in an interest bearing fund).[64]

The Secretary of the Interior recommended that Congress ratify the Agreement,[65] and on February 18, 1907 the Senate Committee on Indian Affairs reported a ratification bill as a substitute for the original Gamble bill.[66] By this time, however, the House had already debated and passed a second Burke bill which incorporated substantially the terms of the agreement without

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[62]Letter from E. A. Hitchcock, Secretary of the Interior, to the Chairman Committee on Indian Affairs, House of Representatives, February 14, 1907 (enclosing agreement) in H.R. Rep. No. 7613, 59th Cong., 2d Sess. 5 (1907).

The described area includes a small corner of Lyman County.

[63]*Id.* at 5, 6, 7.

[64]*Id.* at 6.

[65]*Id.* at 4.

[66]S. Rep. No. 6831, 59th Cong., 2d Sess. (1907).

reference to it.[67] Senator Gamble immediately steered the House bill through the Senate[68] and it passed without debate, with, however, an amendment which provided for five percent instead of three percent interest on the accumulated fund in conformity with the 1907 Agreement.[69] The Senate receded from its amendment in conference,[70] and the bill became law March 2, 1907.[71]

As noted, the House bill was not in form a ratification of the 1907 Agreement.[72] In place of the Agreement's language of cession quoted above, the Act provides that the "Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell

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[67]41 Cong. Rec. 3103-05 (1907) (H.R. 24987); *see* H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3 (1907).

[68]On February 18 Senator Gamble brought the bill to the floor of the Senate and attempted its passage; objection was raised that it had not yet been to committee, and it was so referred. 41 Cong. Rec. 3182-83 (1907). Senator Gamble reported it from the Committee on Indian Affairs the next day, S. Rep. No. 6838, 59th Cong., 2d Sess. (1907), whereupon it passed the Senate. 41 Cong. Rec. 3323 (1907).

[69]41 Cong. Rec. 3323 (1907); *see* 41 Cong. Rec. 3182 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 1 (1907).

[70]41 Cong. Rec. 3996 (1907).

[71]Act of March 2, 1907, ch. 2536, 34 Stat. 1230.

[72]The following exchange occurred during the House debate:

> Mr. FITZGERALD. The Commissioner of Indian Affairs recommended that all after the enacting clause be stricken out and the agreement be inserted and ratified. That has not been done, and that has not been the practice for several years. I wish to ask this question: Have the provisions of the treaty been inserted in this bill?
>
> Mr. BURKE of South Dakota. I may say to the gentleman that they have been.

41 Cong. Rec. 3104 (1907).

or dispose of" the described unallotted lands.[73] With the exception of the reduction of the interest rate from five to three percent, the substantial terms of the Agreement are contained verbatim in the Act.[74] The Act contains additional language granting the school lands to the State of South Dakota,[75] and appropriating funds for the purchase of the school lands and for making the allotments provided therein.[76]

The 1907 Act is, in substance, identical to the 1904 Act: Congress directs that, with the exception of school lands, the unallotted lands in the described tract be offered for sale to homesteaders at specified prices;[77] the United States is to act as trustee for the Indians to dispose of said lands and to collect and dispense the proceeds; and the United States is to purchase and convey the school lands to the State of South Dakota.

Nothing in the language of the 1907 Act or in the surrounding circumstances and legislative history indicates a change in that congressional determination to alter the reservation boundaries which we have found in the 1904 Act.[78]

This continuity of purpose was expressed by Congressman Burke on the floor of the House:

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[73]1907 Act §1, 34 Stat. 1230.

[74]There are further differences between the Agreement and the Act which neither party has stressed.

[75]1907 Act §§1, 6, 34 Stat. 1230, 1231.

[76]1907 Act §7, 34 Stat. 1231-32.

[77]Six dollars per acre for lands entered within the first three months, four dollars and fifty cents per acre for lands entered during the second three months, and two dollars and fifty cents per acre for lands entered thereafter. 1907 Act §3, 34 Stat. 1230-31.

[78]Since the Tribe urges that the 1904 Act did not alter the boundaries, it does not contend that any change of purpose is evinced by the 1907 Act.

> Mr. Speaker, the bill has the unanimous report of the Committee on Indian Affairs, in which committee it was very carefully considered. The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by forty-two more than a majority of the male Indians over the age of 18 years. It is in line with the recent bills that have been passed affecting the sale of the Indian reservations. It is along the line of the bill which passed in the Fifty-eighth Congress for the sale of that portion of this same reservation that is located in Gregory County. The maximum price of the land in that bill was fixed at $4 per acre, while the maximum price in this bill is $6 per acre.
>
> The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. They will have left, after this land is disposed of, *a reservation that is substantially 50 miles square*, and there are only 5,000 Indians.

41 Cong. Rec. 3104 (1907) (Emphasis added).

The continuity is further evidenced by the House and Senate Reports which note that the "sale and disposition of the lands in Gregory County have proven very satisfactory" and are substantially completed.[79] These reports also cite as precedent supporting the school lands provision, all prior acts opening reservations in South Dakota (including the 1904 Gregory County Act).[80] The

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[79]H.R. Rep. No. 7613, 59th Cong., 2d Sess. 2 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 1 (1907) (quoting House Report).

[80]H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 3 (1907) (quoting House Report).

As in 1904 the school lands provision was based on the South Dakota enabling act, and is further evidence of the intent to

[footnote continued]

1907 Act was clearly presented to Congress generally as one of a series of bills effecting the sale of Indian reservations, and specifically as a continuation of the process of diminishing the Rosebud Reservation begun with the 1904 Gregory County Act.

It is evident as well that this continuity was perceived by the Rosebud Indians. As the trial court observed, "[i]t is difficult for one to read the transcript of the negotiations in 1906 without feeling that this was merely a continuation of the original negotiation in 1901 which culminated in the Gregory County act, the 1904 Act, discussed above."[81] We need simply note that the 1907 Agreement is similar in form to the 1901 Agreement, was negotiated between the same parties, and contains similar language of cession.

Further, the language and legislative history of the 1907 Act affirmatively indicate that the Act was intended to alter the reservation boundaries. That Gregory County was no longer considered within the boundaries of the reservation is clear from the description of the tract to be sold or disposed of under the 1907 Act, the purpose of which was "to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County."[82] Said tract is described as:

> all that portion of the Rosebud Indian Reservation in South Dakota lying South of Big White River and

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extinguish the reservation in Tripp County. H.R. Rep. No. 7613, 59th Cong., 2d Sess. 3-4 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 3 (1907) (quoting House Report). See our discussion of the 1904 school lands provision, *supra* at 27-30.

[81] *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065, 1075 (D. S.D. 1974).

[82] H.R. Rep. No. 7613, 59th Cong., 2d Sess. 1 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 1 (1907) (quoting House Report).

> east of range twenty-five west of the sixth principal meridian * * *.[83]

Not only Tripp County, but Gregory County would fall within this description unless it (Gregory County) was not considered a "portion of the Rosebud Indian Reservation." It clearly was not. As the House and Senate reports state:

> [The 1904 Act authorized] a sale of so much of this same reservation as *was* located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. [Emphasis added.][84]

These materials concerning the description of the tract affected by the 1907 Act not only provide a contemporaneous and authoritative construction of the 1904 Act which supports our interpretation thereof, but also directly indicate, in light of the continuity discussed above, that the 1907 Act was similarly intended to further construct the boundaries of the Rosebud Reservation.

This intent was given firm expression by Congressman Burke during the House debate, whose remarks are unambiguous:

> They will have left, after this land is disposed of, a reservation that is substantially fifty miles square * * *.[85]

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[83] 1907 Act §1, 34 Stat. 1230.

[84] H.R. Rep. No. 7613, 59th Cong., 2d Sess. 1-2 (1907); S. Rep. No. 6838, 59th Cong., 2d Sess. 1 (1907) (quoting House Report).

[85] 41 Cong. Rec. 3104 (1907). Todd and Mellette Counties make up a generally square area, roughly fifty miles on a side.

The allotment provisions of the 1907 Act are asserted by the Tribe to support its position against disestablishment. The 1907 Act, provided, with respect to allotments, as follows:

> That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation * * *.

1907 Act §2, 34 Stat. 1230.

The Tribe argues that the provision respecting allotments "anywhere within said reservation," which then included Tripp County, clearly negates a congressional intent "to dissolve the reservation status of the Tripp county portion of the reservation" since, it argues, had dissolution been intended, Congress "hardly would have provided for 160 acre allotments anywhere on the reservation, including Tripp county."

The argument stems from a misinterpretation of the legislative history. Inspector McLaughlin's letter of instructions from the Commissioner of Indian Affairs stated that:

> The Office is in receipt of a communication of November 22 from Hon. Charles H. Burke, wherein he says that he recently visited the Rosebud Reservation for the purpose of gaining information with a view to preparing a bill for the sale of that part of the reservation located in Tripp County; that he found that a large number of Indians had taken allotments in the western and southwestern parts of the reserve, on lands which are now, and always will be, worthless, being nothing but sandhills; that the Indians who have allotments in the reservation elsewhere than in Tripp County should be permitted, in the discretion of the Secretary of the Interior, to relinquish them and to take allotments in lieu thereof in some other part of the reservation, including Tripp county * * *.[86]

The Inspector, in negotiating with the Indians, accordingly informed them of their rights to reallotment anywhere on the reservation,[87] and the specific mention

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[86] Letter from F. E. Leupp, Commissioner of Indian Affairs, to Inspector James McLaughlin, December 5, 1906 at 4, 3 App. at 169.

[87] [INSPECTOR McLAUGHLIN:] 8th. You ask that those entitled to allotments, but have not yet taken them, be allotted, of which there are about 80 in all. In answer to that I will say there will be no difficulty in that. All beneficiaries of the reservation who have not yet received allotments can be allotted before Tripp County is opened to settlement, and they can take them anywhere on the reservation, including Tripp County. There will be a provision in the agreement to that effect.

9th. You desire that applications now pending before the Indian Office asking to be permitted to change present location of allotments be acted on before the opening of Tripp County. I can promise to incorporate that provision in the agreement, and you people will be fully protected in that. As I previously stated, it would doubtless take a couple of years to bring about the opening of Tripp County. These allotments are what would delay it. We will incorporate in the agreement a provision that Tripp County shall not be opened until all the children born up to the ratification of the agreement, who have not received allotments, shall be allotted 160 acres each. These two items are already covered by the Burke Bill, which provides for relinquishments and reallotments and allotment to children, and giving the right to take such allotments in Tripp County.

Proceedings of a Council held at Rosebud Agency, S.D. with the Indians of the Rosebud Reservation, December 14, 1906 at 17-18, 3 App. at 192-93.

of Tripp County in this connection was to remedy, "before the opening of Tripp County," the prior taking of poor land. There is no negation here of congressional intent to disestablish. The entire tenor of the negotiations and the contemporary documents are consistent with a congressional intent to extinguish the reservation status of the County rather than the contrary.

After careful review we conclude that the language, legislative history and circumstances surrounding the passage of the 1907 Act, like the 1904 Act, clearly indicate a congressional determination to terminate the reservation in the counties affected by the Act.[88]

Continued pressure for additional land, the "march of progress and civilization westward" in the language of the times, resulted in the passage of the Act of May 30, 1910, ch. 260, 36 Stat. 448. Unlike the 1904 Act and the 1907 Act, the 1910 Act was not preceded by formal negotiations and agreement with the Rosebud Indians. In the waning months of the 60th Congress Senator Gamble introduced and reported from committee a bill to open all the unallotted lands in Mellette County and in a strip

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[88]Subsequent enactments by the Congress itself provide an authoritative contemporary construction of the 1907 Act which supports this conclusion.

By the Act of August 17, 1911, ch. 22, 37 Stat. 21 Congress granted to "any person who has heretofore made a homestead entry for land in *what was formerly a part of the Rosebud Indian Reservation*, in the State of South Dakota, authorized by [the 1907 Act,]" an extension of time within which to make his payments. (Emphasis added.)

By the Act of January 11, 1915, ch. 8, 38 Stat. 792 Congress disposed of certain mineral lands "*in Tripp County in what was formerly within the Rosebud Indian Reservation* in South Dakota, as have heretofore been opened to settlement under Acts of Congress which did not authorize the disposal of such mineral lands * * *." (Emphasis added.)

of land in the eastern part of Todd County.[89] The bill was reported favorably despite the opinion of the Secretary of the Interior that "the views of the Indians should be procured before the bill is finally acted on," and his recommendation "that the strip of land on the east of *the present diminished reservation* should [not] be opened yet."[90] Senator Gamble was unable to obtain the Senate's consideration of the bill before the term of Congress expired,[91] but shortly thereafter, in March and April, 1909, Inspector McLaughlin conducted discussions with the Rosebud Indians concerning the Gamble bill. At first the Indians were opposed to the bill,[92] but later many expressed a willingness to part with Mellette County, provided the terms were favorable.[93] They remained opposed, however, to the opening of the eastern part of Todd County.[94] Inspector McLaughlin did not seek to negotiate an agreement with the Indians, but reported to the Secretary of the Interior his opinion that a "large majority" of the Rosebud Indians were

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[89]43 Cong. Rec. 65 (1908) (S. 7379 introduced); S. Rep. No. 887, 60th Cong., 2d Sess. (1909).

[90]Letter from J. R. Garfield, Secretary of the Interior, to R. J. Gamble, U.S. Senate, January 26, 1909 in S. Rep. No. 887, 60th Cong., 2d Sess. 3 (1909) (Emphasis added).

[91]*See* 45 Cong. Rec. 1679 (1909).

[92]*Transcript of Council held at Rosebud Agency, March 11, 1909*, 3 App. at 293-300. McLaughlin, formerly known to the Sioux as "White Head," was given a new name by High Pipe: "*The man who bothers his friends for more land.*" *Id.* at 4, 3 App. at 296.

[93]*Proceedings of Council held with the Indians of the Rosebud Reservation, April 12 & 26, 1909* at 6-8, 11, 20-27; 3 App. at 306-08, 311, 320-27.

[94]*Id.*

favorable to the opening of Mellette County under the provisions of the Gamble bill.[95]

Both Congressman Burke and Senator Gamble introduced bills in the 61st Congress similar in purpose to the original Gamble bill.[96] In January, 1910 the Secretary of the Interior recommended that only Mellette County be opened but not the eastern part of Todd County.[97] He also proposed the inclusion of a provision (which will be hereinafter discussed) prohibiting the introduction of intoxicants into the affected lands.[98] The Senate bill was reported and passed with amendments implementing the Secretary's proposals.[99] It then passed the House with amendments and, after conference to reconcile House and Senate differences not material here, the bill became law May 30, 1910.[100]

The 1910 Act is substantially similar to the 1907 Act. Its operative language is identical:

> That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter

[95]Letter from James McLaughlin to the Secretary of the Interior, April 29, 1909 at 4, 3 App. at 332.

[96]44 Cong. Rec. 132 (1909) (S. 183); 44 Cong. Rec. 2013 (1909) (H.R. 9544); 45 Cong. Rec. 10 (1909) (H.R. 12437).

[97] *See* Letter from R. A. Ballinger, Secretary of the Interior, to Moses E. Clapp, Chairman Committee on Indian Affairs, U.S. Senate, January 13, 1910 in S. Rep. No. 68, 61st Cong., 2d Sess. 4 (1910).

[98] *Id.* at 5.

[99]S. Rep. No. 68, 61st Cong., 2d Sess. (1910); 45 Cong. Rec. 1065, 1066, 1075 (1910).

[100]Act of May 30, 1910, ch. 260, 36 Stat. 448; 45 Cong. Rec. 6437 (1910) (Conference Report passes House); 45 Cong. Rec. 6326 (1910) (Conference Report passes Senate); 45 Cong. Rec. 5473 (1910) (S. 183 passes House); *see* H.R. Rep. No. 429, 61st Cong., 2d Sess. (1910).

> provided, to sell or dispose of all that portion of the Rosebud Indian Reservation [described by metes and bounds] except such portions thereof as have been or may be hereafter allotted to Indians * * *.[101]

The lands affected are those in the present day Mellette County, which lies north of Todd County and west of Tripp County.

It was provided that after allotments within the affected area had been completed, the lands should be opened to settlement and entry under the general homestead and town-site laws by proclamation of the President.[102] Unlike the 1907 and 1904 Acts, which fixed the prices to be paid by homesteaders, the 1910 Act provided for the classification and "appraisement" of the lands and for their sale at the appraised prices. It also provided for the surveying of town-sites and the sale of town lots.[104]

The Act also contained the familiar school lands provision by which the United States purchases and grants to South Dakota two sections in each township for the use of the common schools.[105] As in the 1904 and 1907 Acts, the United States was not otherwise obligated

[101]1910 Act §1, 36 Stat. 448-49; *see* 1907 Act §1, 34 Stat. 1230. The 1910 Act further excepts from sale lands classified as "timber lands," and authorizes the Secretary to reserve from sale lands "he may deem necessary for agency, school, and religious purposes." 1910 Act §1, 36 Stat. 449.

[102]1910 Act §2, 36 Stat. 449.

[103]1910 Act §§4, 5, 36 Stat. 450.

[104]1910 Act §3, 36 Stat. 449-50.

[105]1910 Act §8, 36 Stat. 451.

to purchase, but was to act as trustee for the purpose of sale and to collect and disburse the proceeds.[106]

The 1910 Act contains two further provisions which, because of their language and history are of peculiar relevance to the problem before us. The first, a proviso in section 1 of the Act, permits an Indian who has taken an allotment "on the tract to be ceded" to substitute therefor an allotment "on the diminished reservation."[107] The second, section 10 of the Act, subjects the affected tract for twenty-five years "to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country."[108] These provisions will be discussed more fully below.

Again, we find nothing in the language of the 1910 Act or in the surrounding circumstances and legislative history which indicates a change in that congressional determination to alter the reservation boundaries which we have found in the 1904 and 1907 Acts.[109] We deem it unnecessary to detail *in extenso* the legislative history and surrounding circumstances evidencing the general continuity of purpose among the Rosebud acts.[110] The sponsors of the 1910 Act placed the bill in the context of the westward expansion which began with the breakup of the Great Sioux Reservation:

> Mr. GAMBLE. Mr. President, I have apologized many times for taking the time of the Senate, but twenty years ago practically the entire western half

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[106]1910 Act §11, 36 Stat. 451-52.

[107]1910 Act §1, 36 Stat. 449.

[108]1910 Act §10, 36 Stat. 451.

[109]See note 78 *supra*.

[110]*E.g.*, 45 Cong. Rec. 5456-57 (1910) (remarks of Congressman Burke).

> of the State was an Indian reservation. It has been opened gradually and by degrees. The Indian reservations have stood as a menace to the development and the growth of the Commonwealth. The Indians themselves agreed to the provisions of this bill after it had been submitted to them for their consideration. The department agreed to it. It follows in line, Mr. President, with all of the measures providing for opening reservations in the Western States.[111]

The only change in policy[112] noted during the debates was the change in the method of payment which was

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[111]45 Cong. Rec. 1074 (1910). The remark that the Indians had agreed to the provisions of the bill is, at best, an overstatement.

[112]The Dawes Act, the Act of February 8, 1887, ch. 119, 24 Stat. 388, expressed the philosophy of the era. It represented an effort to compromise the Government's responsibility to the Indians for their welfare, with the ever increasing pressures, to which we have heretofore made reference, for the opening of the land to settlers. It authorized allotments to the Indians and sale, with the tribes' consent, of the remaining "surplus" lands, the proceeds being reserved for the benefit of the Indians.

> The chief advantages that the new system was to bring to the country as a whole were to be found in the opening up of surplus lands on the reservations * * *. In his report of 1880, [Interior] Secretary Schurz wrote:
>
> > "[Allotment] will eventually open to settlement by white men the large tracts of land now belonging to the reservations, but not used by the Indians. It will thus put the relations between the Indians and their white neighbors in the western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions."

F. Cohen, *Handbook of Federal Indian Law* 208-09 (1942) (quoting Otis study) (footnote omitted).

instituted with the 1904 Act.[113] McLaughlin's new name, *"The man who bothers his friends for more land,"* attests to the continuity as perceived by the Rosebud tribe.

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[113] As stated by Congressman Burke:

> The original treaty made in 1889 with these Indians provided expressly that after the lands had been allotted to the Indians the surplus lands should then be disposed of under the provisions of the homestead law.
>
> * * * *
>
> I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian reservations. One is, at the earliest possible date, to get among the Indians the white man, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, and I believe that the placing through *what were heretofore reservations* actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value.

45 Cong. Rec. 5457 (1910) (Emphasis added).

Senator Crawford emphasized the new method of payment:

> Mr. President, this bill was introduced by my colleague, and he is in charge of it, but it is one of interest to my State, * * *. I have lived in the West all my life, and I have lived in South Dakota half of my life. It was a Territory when I went there, and almost all of the west half of it was an Indian reservation, occupied by the Sioux Indians.
>
> By treaties negotiated from time to time, and by laws enacted from time to time, the area of lands occupied by the Indians has gradually narrowed to smaller and smaller limits, until now the lands owned by the Indians are comparatively small in quantity. They are not lands which in their possession bring any revenue whatever. They do not cultivate them. There is neither fish nor game upon them. The policy of the

[footnote continued]

Further, there are clear indications in the legislative history of the 1910 Act that Congress understood that the 1904 and 1907 Acts had altered the reservation boundaries and that such would be the effect of the bill before it.[114] Significantly, the Tribe offers no explanation of how the boundaries of the reservation could remain inviolate while the area contained therein was shrinking from 3,000,000 acres to 1,000,000 acres as outlined in the House report:

> The Rosebud Indian Reservation when set aside as a separate reservation under the Sioux act of 1889 contained something over 3,000,000 acres of land. In 1904 the unused and unallotted portion of the reservation in Gregory County, about 500,000 acres, was disposed of and the Indians received therefrom something more than $1,250,000. In the Fifty-ninth Congress a law was enacted authorizing the sale of the unused and unallotted lands in that portion of the reservation in Tripp County, compris-

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> Government toward the Indians and toward these lands has changed in more recent years simply in this respect—that the lands be sold and the proceeds made into a trust fund, the principal forever held inviolate and the income from which is devoted to the Indians.
>
> When these lands under this bill and similar bills are thrown open to settlement, the Indian first selects by allotment the portion he is allowed to take upon the abandonment of his tribal relations, and the balance is sold to the settler, who must first make entry and settlement and comply with the provisions of the law and then pay the Government, and the proceeds go into the fund for the Indians.

45 Cong. Rec. 1068 (1910).

[114] Thus we need not rely merely on such references to "the present diminished reservation" or to "what were heretofore reservations" as appear with some frequency throughout the 1910 materials and some of which we have quoted above with emphasis.

ing about 1,000,000 acres, under a bill substantially in the same form as the bill now under consideration, except that the price of the land was fixed in the law, whereas under this bill the price is to be fixed by appraisement. The proclamation for the disposition of Tripp County lands was not issued until last year, and therefore it was not subject to filing until that time. A very large part of the lands has been entered under the homestead laws, but it is not possible to state just how much will be received from the sale of the lands in Tripp County; it will, however, undoubtedly amount to $4,000,000.

The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. There will still be left a reservation containing about 1,000,000 acres, and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of.

H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910).[115] We

[115] The Senate report similarly contemplates a change in the size of the reservation:

> The *present* area of the Rosebud Indian Reservation aggregates about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of about 830,000 acres. It is the understanding of your committee that practically all the allotments to adult Indians on this reservation have been made. Provision has been made under recent statutes for the allotment of all the minor children on the reservation, and this work is now in progress and it is understood that practically all such allotments have been made to those so desiring allotments within the area described in section 1 of this bill.
>
> The reservation is *yet* large, and in the judgment of your committee the surplus and unallotted

[footnote continued]

agree with the trial court[116] that this statement affords strong support for the conclusion that the three acts before us altered the reservation boundaries.[117]

We have discussed heretofore the school lands provision of the 1904 and 1907 Acts. The provision before us, section 8 of the 1910 Act, is substantially identical to those of 1904 and 1907. It was similarly justified as required to "keep good the pledge" in the South Dakota enabling act,[118] and is further evidence that the 1910 Act was intended to extinguish the Reservation in Mellette County.[119] Two other provisions unique to the 1910 Act, the substitute allotment provision and the intoxicants provision, confirm this conclusion.

Section 1 of the 1910 Act contains the following proviso:

> *Provided,* That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered

> lands are unnecessary for the use of the Indians, and the opening of the reservation would result in a large increase in the settlement and the development of that part of the State, and would enhance to a very large extent the holdings of the Indians.

S. Rep. No. 68, 61st Cong., 2d Sess. 2 (1910) (Emphasis added).

[116] *Rosebud Sioux Tribe v. Kneip,* 375 F.Supp. 1065, 1079 (D. S.D. 1974).

[117] While not technically evidence of congressional intent in 1904 and 1907, the statement is an authoritative contemporary construction of the two prior acts.

[118] 45 Cong. Rec. 1068 (1910) (remarks of Senator Crawford). *See* S. Rep. No. 68, 61st Cong., 2d Sess. 3 (1910); H.R. Rep. No. 429, 61st Cong., 2d Sess. 2 (1910); 45 Cong. Rec. 1067-68, 1071 (1910) (remarks of Senators Davis and Crawford); 45 Cong. Rec. 5472 (1910) (remarks of Congressman Burke).

[119] See our discussion at 27-30, *supra.*

for sale, relinquish same and select allotments in lieu thereof on the diminished reservation * * *.

36 Stat. 449. The Tribe urges that "diminished reservation" refers to Mellette County;[120] it argues that this proviso and the clause requiring the completion of allotments in Mellette County[121] indicate an intent to continue Mellette County as a reservation. In the light of the history of this legislation, and its background,[122] we do not think the fact that Indian allottees would continue to live in Mellette County is persuasive to the point that the county would remain within the reservation. Further we find that the phrase "diminished reservation" in context is distinguished from "the tract to be ceded," and that it clearly refers to Todd County, the remaining unopened reservation.[123] This statutory use of

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[120] *See United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687 (8th Cir. 1973).

[121] Section 2 of the 1910 Act contains the following proviso:

> *Provided*, That prior to said proclamation [opening the reservation] the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed * * *.

36 Stat. 449.

[122] *E.g.*, the Act of March 2, 1889, ch. 405, 25 Stat. 888, the "Crooks Treaty" which carved the Great Sioux Reservation into separate smaller reservations. Under the terms of the Act Indians who had taken allotments on lands in the area between the described reservations were permitted to remain there, although the area was restored to the public domain and opened to settlement. *Id.* §§15, 21, 25 Stat. 893, 896.

[123] This contrasts with the language and history of the 1907 Act discussed *supra* at 42-44. We note that when a similar provision was inserted in a subsequent bill proposing the opening of Todd County, the Department of Interior recommended its excision, stating:

> If the bill becomes law, it will provide for opening all the lands now constituting the diminished Rosebud

[footnote continued]

the phrase "diminished reservation" confirms our view that the reservation was "diminished" in a geographical sense (by an alteration of the boundaries) and not in the weaker sense urged (by the loss of tribal title to lands remaining within the reservation).[124]

We also find it significant that although the 1910 Act does not contain the language of cession found in the 1904 Act, it nevertheless refers to Mellette County as "the tract to be ceded." Evidently Congress had not changed its purpose and still considered the 1910 Act to effect a cession of Indian lands.

Section 10 of the 1910 Act provides:

> That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.[125]

In 1910 there was an outstanding federal prohibition against the introduction or attempted introduction of intoxicants into "Indian country."[126]

> Reservation, and there will, therefore, remain no further diminished reservation.

Letter from S. Adams, First Assistant Secretary, Dept. of the Interior, to R. J. Gamble, Chairman Committee on Indian Affairs, U.S. Senate, April 30, 1912 in S. Rep. No. 1166, 62nd Cong., 3d Sess. 4 (1913).

[124] See our discussion of this point in connection with the surrounding circumstances and legislative history of the 1904 Act *supra* at 26-27.

[125] 36 Stat. 451.

[126] Act of July 23, 1892, ch. 234, 27 Stat. 260; *see generally* Dept. of the Interior, *Federal Indian Law* 381-82, 386-87, 390 (1958).

The trial court held that thus subjecting the Mellette County land to the liquor proscription applicable to "Indian country" manifested a congressional intent that the County would henceforth not be Indian land, since, if it were, there would be no need for the proscription.[127] The court also noted the power of Congress to impose liquor restrictions on ceded lands adjoining Indian country in order to prevent white-Indian border traffic in liquor.[128] The Tribe takes the contrary view, arguing principally that in view of the 1910 construction of "Indian country," Section 10 was intended not to diminish but to enlarge "the protection attaching to the reservation." Assuming, arguendo only, a possible ambiguity in the statute, we turn again to the legislative history for the congressional intent.

Section 10, modeled after the provision in a congressionally ratified cession agreement with the Nez Perce Indians which was upheld by the Court in *Dick v. United States*, 208 U.S. 340 (1908),[129] was vigorously debated in the House.[130] Its opponents contended that under *In re Heff*, 197 U.S. 488 (1905)[131] the provision was *ultra vires* since the Rosebud Indians, by taking allotments, had become citizens of the United States subject to the

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[127] *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065, 1080 (D. S.D. 1974).

[128] *Id.*

[129] *See* Letter from R. A. Ballinger, Secretary of the Interior, to Moses E. Clapp, Chairman Committee on Indian Affairs, U.S. Senate, January 13, 1910 in S. Rep. No. 68, 61st Cong., 2d Sess. 5 (1910); H.R. Rep. No. 429, 61st Cong., 2d Sess. 3 (1910); 45 Cong. Rec. 5473 (1910) (remarks of Congressman Burke).

[130] 45 Cong. Rec. 5460-64, 5473 (1910).

[131] *Heff* was overruled by *United States v. Nice*, 241 U.S. 591, 601 (1916).

laws of South Dakota and free from the police power of Congress.[132] The proponents, on the other hand, considered the provision a valid condition on the sale of the land and were corrected when they referred to the land as on or within the boundaries of the reservation:

> Mr. GOEBEL. I am opposed to attaching to the sale of any reservation conditions such as are proposed in this bill.
>
> Mr. GRONNA. Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold? Would the gentleman not buy land on a reservation where protection is given by the Government, even if such reservation is located in a prohibition State?
>
> Mr. GOEBEL. Oh, I do not know what I would do. At present I would want to get the land without any conditions attached. *You must also bear in mind that when the lands are sold there is no longer a reservation,* and the laws of the States apply.
>
> * * * *
>
> Mr. BUTLER. * * * The Indian should not be tempted, if it is possible to keep the tempter away from him. Rum should not be sold to him, and no one should be permitted or encouraged to make the sale to him. I can see no reason why the Government should not impose this condition upon this land.
>
> Mr. MURPHY. Then we ought to make this just as strong as possible, ought we not?
>
> Mr. BUTLER. Yes, sir. Make it as strong as possible. You can not make it too strong for me. Mr. Chairman, this land, as I understand, is within the boundaries of an Indian reservation. Is that right?

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[132] 45 Cong. Rec. 5460, 5462-64 (remarks of Congressmen Bartholdt and Goebel).

Mr. BURKE of South Dakota. Yes, sir.

Mr. BUTLER. It is proposed now to make a sale of it to somebody of some color, white or black, it does not matter. This being so, the Government has the right to impose at this time upon these titles this condition.

Mr. BARTHOLDT. *But if the lands are allotted it is no longer an Indian reservation.*

Mr. BUTLER. *If the lands are allotted it will be no longer an Indian reservation. If the land is sold it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood * * *.*

45 Cong. Rec. 5463-64 (1910) (Emphasis added).

It is highly significant that the proponents of the Section 10 acceded to the contention that the lands would no longer be an Indian reservation, and justified their position with the same argument used in *Dick, supra*—that the lands were in the neighborhood of the Indian where he would be likely to frequent.[133] There

[133]In *Dick* the Court upheld the intoxicant provision as an exercise of Congress' treaty-making power and its power to regulate commence with the Indian tribes. *Dick v. United States*, 208 U.S. 340, 359 (1908). The Court quoted *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 195 (1876):

> "If liquor is injurious to them inside of a reservation, it is equally so outside of it, and why cannot Congress forbid its introduction into a place *near by, which they would be likely to frequent?*" * * * "If Congress has the power" * * * "to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction" * * *. [Emphasis in original.]

[footnote continued]

can be no doubt here as to intent. Both sides are explicit "that when the lands are sold there is no longer a reservation." Section 10 and its legislative history reflect a congressional understanding that the effect of the 1910 Act would be to terminate the reservation status of the Mellette County lands.

What we find here is the continuation of the policy, heretofore adopted and implemented, of reducing the size of the Rosebud Reservation in order to make a portion of its lands available to the new settlers. Again, the congressional motivations are clear, as is its intent.[134]

The Tribe has sought that we declare that the Acts of 1904, 1907, and 1910 did not alter the boundaries of the Rosebud Reservation as fixed by the General Crooks treaty of 1889. This we cannot do. We have reviewed with care the pressures for opening,[135] the legislative

340 U.S. at 357. *See generally* Dept. of the Interior, *Federal Indian Law* 385 (1958).

Dick was specifically relied on by Congressman Burke in the debate, 45 Cong. Rec. 5473 (1910).

[134]A subsequent enactment regarding Mellette County confirms this conclusion. By the Act of March 3, 1919, ch. 110, 40 Stat. 1320 Congress authorized the sale for cemetery purposes of a described "ten-acre tract within the *former Rosebud Indian Reservation in Mellette County*, South Dakota." (Emphasis added.)

[135]The scenes upon opening are described in Smith, *New Town Et Al.: A Reply*, 18 S.D. L. Rev. 327, 332-33 (1973), and are indicative of the public pressures existing at the time:

> By the time of the "opening" of Gregory County, congressional desire for Indian lands was reaching a crescendo. The Gregory County Act provided for approximately 2,412 homesteads of 160 acres each. About a quarter of a million people descended upon the local land offices at Bonesteel,

[footnote continued]

histories of the Acts, their content, provisions, and contemporaneous construction, as well as their subsequent treatment and interpretation. Against this background it is clear beyond reasonable question that the Acts were passed with the intent of doing away with the Reservation in those portions affected by the opening of the lands for entry and settlement. The boundaries were thus necessarily altered.

The problems before the Congress at the turn of the century with respect to the western lands permitted no easy solutions. The choices were difficult but they were

---

Fairfax, Chamberlain, and Yankton, and 106,308 of these completed applications to be eligible for these 2,412 homesteads. At the Yankton Office, where 57,434 applications were filed,

> the crowds . . . broke all previous records. Hundreds slept in line at the land office, day and night, for a considerable time, to be in readiness to make their filings. On one day in July nearly seven thousand people were thus registered. It was estimated that nearly one thousand people were in line one morning at one time, having slept there all night. At 4 o'clock in the morning the lines were joined by 1,000 more until they extended one block and a half from one office and nearly as far . . . at another office. A carload of ready eatables came from Sioux City and was sold to the men waiting in line. The rush in the city and especially on the trains was something that had never been witnessed before in this state.

The same is true for the Tripp County and Mellette County Acts. A total of 114,769 persons applied for 4,000 homesteads in Tripp County and a similar occurrence was the story of Mellette County. [Footnotes omitted.]

made by the representatives of the people and it is not our function to fashion a wiser course under the guise of interpretation.

Affirmed.

A true copy

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

JUDGMENT

(Filed July 16, 1975)

Appeal from the United States District Court for the District of South Dakota

This Cause came on to be heard on the record from the United States District Court for the District of South Dakota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

APPENDIX B

[1065]

ROSEBUD SIOUX TRIBE

v.

Hon. Richard KNEIP, Governor of the State of South Dakota, et al.

No. Civ. 72-3030.

United States District Court,
D. South Dakota.
Feb. 6, 1974.

Declaratory judgment action by Indian tribe seeking declaration that three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries. The District Court, Bogue, J., held that conclusion was required from surrounding circumstances, including congressional history, that the three acts in question did diminish the Rosebud Sioux Reservation, and that South Dakota could exercise jurisdiction over Indian people in counties of Gregory, Tripp, Mellette, and what was Lyman.

Judgment accordingly.

1. Indians ⇦3

Intent to abrogate treaty rights is not lightly imputed to Congress.

2. Indians ⇦12

Congress having once established Indian reservation, all tracts remain part of that reservation until separated therefrom by Congress.

3. Indians ⇦12

Congressional intent to disestablish Indian reservation must be either ex-

pressed on face of act or be clearly discernible from surrounding circumstances and legislative history.

4. Indians ⇐12

Opening Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation.

5. Indians ⇐27(2)

Generally, Indians are to be left free from state jurisdiction and control, and federal jurisdiction is preferred.

[1066] **6. Indians ⇐3, 6**

Courts must construe treaties and statutes passed for the benefit of Indians and Indian tribes liberally, and wherever possible resolve any doubt in favor of the same.

7. Indians ⇐12, 27(2)

In view of surrounding circumstances, including congressional history, conclusion was required that three acts of Congress, passed in 1904, 1907, and 1910, were intended to diminish the Rosebud Sioux Reservation, and that the state of South Dakota could exercise jurisdiction over Indian people in the counties of Gregory, Tripp, Mellette, and what was Lyman. Treaty with the Sioux Indians, 15 Stat. 635; Act Feb. 22, 1889, § 10, 25 Stat. 676; Act March 2, 1889, 25 Stat. 888; Act April 23, 1904, 33 Stat. 254; Act March 2, 1907, 34 Stat. 1230; Act May 30, 1910, 36 Stat. 448; 43 U.S.C.A. § 865.

Richard A. Smith, Mark V. Meierhenry, Rosebud, S. D., for plaintiff.

C. J. Kelly, Asst. Atty. Gen., State of South Dakota, Pierre, S. D., William F. Day, Jr., Winner, S. D., for defendants.

MEMORANDUM OPINION

BOGUE, District Judge.

The Rosebud Sioux Tribe has brought this declaratory judgment action pursuant to 28 U.S.C. § 2201 et seq. seeking declarations that three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the act of March 2, 1889. The defendants, the State of South Dakota and the counties of Mellette, Lyman, Tripp and Gregory, assert that the three acts did diminish the Rosebud Reservation so that that reservation presently embraces only Todd County, South Dakota. Acting on this assertion, the defendants have been exercising both civil and criminal jurisdiction over members of the Rosebud Sioux Tribe within the counties of Mellette, Lyman, Tripp and Gregory. The plaintiff does not seek a declaration of the exact nature of the jurisdiction, or the exact rights and privileges that members of the Rosebud Sioux Tribe enjoy in the four counties in question. The plaintiffs do ask this Court to declare whether or not any of the three statutes in question operated to diminish the geographical territory over which the tribe is entitled to exercise jurisdiction.

In recent years there have been many cases with substantially similar ques-

tions presented to the state and federal courts. *See*, Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); City of New Town, N. D. v. United States, 454 F.2d 121 (8th Cir. 1972); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir., filed Dec. 7, 1973); State of South Dakota v. Molash, 199 N.W.2d 591 (S.D.1972); State of South Dakota v. Williamson, 211 N. W.2d 182 (S.D.1973). It is conceded that a declaratory judgment is an appropriate remedy in this circumstance.

PRELIMINARY STATEMENT

In 1868 the United States and the Great Sioux Nation agreed upon the establishment of the Great Sioux Indian Reservation. This treaty was ratified by Congress on February 16, 1869, (15 Stat. 635), and proclaimed by President Andrew Johnson on February 24, 1869. This reservation, as formed by the 1868 Treaty, encompassed all the present state of South Dakota west of the eastern bank of the Missouri River, including the four counties in question. However, the Great Sioux Reservation, as originally established, was diminished by a series of acts. An Act of March 2, 1889, (25 Stat. 888) reduced the Sioux lands to about half their former extent and explicitly restored the remainder to the public domain. This is conceded by the Tribe. In that act, the Rosebud Sioux Reservation was established and

[1067] contained the counties of Mellette, Tripp, Todd and part of Gregory and Lyman. The statutory description of the Rosebud Reservation was as follows:

> "Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pipe Creek; thence down White River to a point intersecting the west line of Gregory County extended north; thence south on said extended west line of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river."

In United States v. Celestine, 215 U.S. 278, 30 S.Ct. 93, 95, 54 L.Ed. 195 (1909) the Supreme Court of the United States said:

> "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

[1–6] The United States Eighth Circuit Court of Appeals has just recently set forth clear guidelines for district

courts in determining jurisdictional questions relating to Indian reservations. The Court said in United States ex rel. Feather et al. v. Erickson, *supra*, the following:

> "We have these guidelines: (1) Intent to abrogate treaty rights is not lightly imputed to Congress. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413, [88 S.Ct. 1705, 20 L.Ed.2d 697] (1968); (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. United States v. Celestine, 215 U.S. 278, 285, [30 S.Ct. 93, 54 L. Ed. 195] (1909); Seymour v. Superintendent, 368 U.S. 351, 359, [82 S.Ct. 424, 7 L.Ed.2d 346] (1962). Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the 'surrounding circumstances and legislative history.' Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 2258, [37 L.Ed.2d 92] (1973); United States ex rel. Condon v. Erickson, 478 F.2d 684, 689 (CA8, 1973); (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. *Seymour, supra. See also Condon, supra*; City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (CA8 1972); (4) The well-preserved general rule is that Indians are to be left free from state jurisdiction and control. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct. 1257, [36 L.Ed.2d -129] (1973); *Condon, supra* at 689 of 478 F.2d and citations. Federal jurisdiction is preferred. *McClanahan, supra.* (489 F.2d at p. 101)

Certainly in construing treaties and statutes passed for the benefit of Indians and Indian tribes, courts must construe them liberally and wherever possible resolve any doubt in favor of the same. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930); Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 50 L.Ed. 941 (1912); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918).

In regard to the three acts in question, it becomes the duty of this Court to examine those acts in relation to the guidelines set forth above to determine whether or not the Congress of the United States, in passing those acts, intended to diminish and extinguish the portions of the reservation covered in
[1068] those acts, or merely to open those portions of the reservation to homesteading, and to not affect the outer confines of the Rosebud Reservation thereby. The acts in question are as follows: April 23, 1904 (33 Stat. 254); March 2, 1907 (34 Stat. 1230); May 30, 1910 (36 Stat. 448). The issue has been extensively and excellently briefed by both sides. In addition, this very issue has been discussed at length in two law review articles. *See*, Comment, New Town, et al: The Future of an Illusion, 18 S.D.Law Rev. 85 (1973); Smith, New Town, et

al: A Reply, 18 S.D.Law Rev. 327 (1973). This Court will consider the acts in the order of passage.

1904 ACT

(Gregory County)

The operative language of the 1904 Act reads as follows:

"Article I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: . . ."

The 1904 Act originated in 1901. When the Rosebud Reservation was created by Congressional Act in 1889, § 12 of that Act read as follows:

"Section 12—That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be

considered just and equitable between the United States and said tribe or Indians, which purchase shall not be complete until ratified by Congress: . . ." Act of March 2, 1889, § 12 (25 Stat. 888).

Pursuant to Section 12, an agreement was reached with the Rosebud Sioux Tribe in 1901 to cede the surplus, unallotted portion of the Reservation lying in Gregory County to the United States. However, the 1901 agreement itself was never ratified by Congress. The portion of Gregory County opened to non-Indian settlers was not approved by Congress until 1904. It is the plaintiffs' contention that this delay marked a departure point—a point at which the whole tenor of congressional reservation policy changed. It appears that the plaintiff concedes that the 1901 agreement would have worked a diminution of the reservation. The plaintiff quotes the following House Report in support of this contention:

"Both of these bills present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement . . . This bill provides that the land shall be disposed of under the homestead laws by the settler paying therefor, and the proceeds paid to the

Indians, and it is expressly provided by Section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or dispose of the same except as provided, or to guarantee to find purchasers for said lands, it is expressly stated that the intention of the Act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale
[1069] therefore only as the same are received." H.R. 10418, 58th Cong., 2nd Sess., January 21, 1904, p. 2.

The plaintiff states in its brief:

"thus, it is clear that, although the Gregory County act does employ some language to the effect that the United States was purchasing a tract of land outright for a consideration with the tribe retaining no interest, this was not the case. Congress actually had just abandoned this policy in favor of a policy whereby the United States acted merely as trustee for the sale of lands for the Indians, with the proceeds of the lands being paid to the tribe only if and when actually received from the homesteaders, instead of the United States paying the Indians a lump sum immediately and then trying to find buyers to recover the purchase price. As Burke stated, the Gregory County Act would establish a new policy, the refinements of which had yet to be made." Plaintiff's brief, (hereinafter cited as PB), at p. 30.

It is, however, the defendant's position that this "new policy" related solely and only to the method of payment and that the purpose and effect of the 1904 Act was the same as the 1889 Act in that regard. That is, that the opening of that portion of the reservation worked a diminution of the outer confines of the reservation and extinguished the same, making the reservation smaller than it originally was.

The Congressional Record is replete with speeches, debates, reports and discussions which tend to support the theory that the time lapse between 1901 and 1904 was because of a change in policy relating to the method of purchasing the lands, rather than the effect that the purchase would have. At 35 Cong.Rec. 3187–88 (1902) is the following statement:

"Mr. Platt . . . it is true that several years ago, I think—in opening Indian reservations, we paid large and extravagant prices for the land to the Indians, upon the theory that the Government was going to be reimbursed for its expenditures by the settlers paying for the land which they settled upon, a sufficient sum to reimburse the Government. That went on for years, and everybody supposed that that was acceptable to the settlers. Then the settlers began to agitate that the Government should remit to them the obligation which they had incurred to pay for the land, and thereby reimburse the Government, and the history of this agitation, of course, is well known. The Government remit-

ted about $35,000,000 which it had paid to the Indians and which the settlers agreed to repay to the Government by the passage of that free homes bill."

At 35 Cong.Rec. 4801–02, Mr. Platt continues the discussion:

"Now this particular agreement comes here to be ratified on a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and *become part of the public domain.* The Indians, in negotiating, said that was not a fair price for the land and they were worth a great deal more. But finally the negotiation was concluded. The agreement comes here. So far as the Senate considers it, it is an agreement to open a reservation—to pass ordinarily without any particular examination or any thought of the consequences to the government in the matter of expense. I will not go into history of the negotiations as to these lands, but the price paid or agreed to be paid to the Indians is $2.50 an acre for the entire acreage *which is to be brought under the public domain by cession to the United States.*

The bill proposes that the land thus acquired shall be opened to homestead settlement without requiring any payment for the land settled upon from the settler. My amendment proposes that the settler pay $2.50 an acre, being the same which the government has agreed to pay to the Indians, and

[1070] that thus the government shall be reimbursed for the amount expended for the purchase. . . ." (Emphasis added)

And at 35 Cong.Rec. 4807, the following statement is seen:

"Mr. Clapp . . . here is this reservation in South Dakota. Of course the senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, *for the purpose of separating the Indians and extinguishing the reservation* or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily and inheritantly worth so much an acre." (Emphasis added)

And finally, after the original bill was, in fact, amended this discussion takes place in the House of Representatives:

"Mr. Burke . . . Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, now a portion of the Rosebud Reservation in South Dakota, being that portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the government this land for $2.50 per acre. That treaty was transmitted to Congress, *and because of the fact that it*

provided that the government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposition of lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.

Toward the concluding days of the last session of Congress, a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the government, disposed of to settlers under the provisions of the Homestead Law, the price to be fixed at $2.50 per acre, as was provided in the original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance and 48 more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the Committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he has no objection to the passage of this bill, provided the Indians were insured of as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3.-00 per acre for all the lands taken within the first six months, and $2.50 for all lands taken thereafter.

It was thought by the Committee that this would certainly insure the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure so far as I know." 38 Cong.Rec. 1423 (1904). (Emphasis added)

It appears, then, that the 1904 Act, as finally passed, incorporates verbatim, the entire text of the 1901 agreement with the exception of the 1901 lump sum section (the 1901 appropriation provisions). It appears that the new policy was, in fact, merely a change in an appropriations matter and not a change in any substantive effect of the act in question. The extended discussions just quoted center on appropriations problems while assuming that the reservation would be extinguished and the land returned to the public domain. The Eighth Circuit Court of Appeals had occasion to consider the effect of this change in policy in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). In *Condon*, the Court said:

[1071]

"Appellee thinks it significant that the 1908 Act provided for the proceeds from the sale of the lands to be deposited into the Treasury of the United States and credited to the Indians as was the case in the 1906 (*Seymour*) and 1910 (*New Town*) Acts. This method contrasts with prior acts wherein payment for the land was made directly to the Indians. It has been aptly pointed out, however, that this was simply a new

> method utilized by a Congress that no longer favored purchasing Indian lands and providing them free of cost to settlers." 478 F.2d 684, 687.

This Court, then, is satisfied that the 1901 agreement and the 1904 Act, concerning Gregory County, were considered by the Congress of the United States to be one and the same with the exception of the appropriation (homestead) provision. The true issue is, however, what was the intention of Congress with regard to the boundaries of the reservation in the 1904 Act.

What was the intention then of Congress in this opening of the portion of the Rosebud Reservation in Gregory County? It is now clearly established that the opening of an Indian reservation is not necessarily inconsistent with the reservation remaining geographically as large as it once was. Seymour v. Superintendent, *supra*; Mattz v. Arnett, *supra*. Again, legislative history is helpful in relation to these acts. c. f. United States ex rel. Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973); *See*, Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973).

Congressional Statements

There are many statements in the Congressional Record which tend to support the defendants' theory that the size of the Rosebud Reservation was, in fact, diminished by the 1904 Act. One quotation, in a committee report, is enlightening:

"There is no question but what the

> Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract, and a reservation about equal in size to the Pine Ridge Reservation in South Dakota." H.R. Rep.No.443, 58th Cong., 2nd Sess. (1904).

Clearly the report suggests that the size of the reservation will be changed. A quick glance at a map will show that Gregory County must be *removed* to provide a "square tract". A copy of a page containing such a map is appended herein as Appendix A. The map is originally found at Comment, New Town, et al.: The Future of an Illusion, 18 S.D.Law Rev. 85, 129 (1973).

In addition, the following discussion takes place at 35 Cong.Rec. 4807:

> "Mr. Clapp . . . here is this reservation in South Dakota. Of course the senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and *extinguishing* the reservation or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily inherently worth so much an acre." (Emphasis added)

And again, in H.R.Rep.No.443, 58th Cong. 2nd Sess. at p. 4 (1904), the following quotation is made of testimony of the Commissioner of Indian Affairs in front of the House Committee on Indian Affairs:

> "If you depend on the consent of the Indians as to the disposition of the lands where they have the fee to the
> [1072] land, you will have difficulty in getting it and I think the decision in the Lone Wolf case, that Congress can do as it sees fit with the property of the Indians will enable you to dispose of the land without the consent of the Indians. If you wait for their consent in these matters, it will be fifty years before you can do away with the reservations."

The law review article cited immediately above contains an extensive discussion of this matter.

It is difficult to read the House and Senate debates and reports without coming to the conclusion that the 1904 Act was an attempt to "do away" with the Rosebud Reservation in Gregory County. That purpose simply seems to be an assumption upon which all actions were taken and statements premised. Other materials similarly lead to that conclusion, however.

School Land Provision

Upon this state's admission to the Union, South Dakota's enabling act provided that:

> "Nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become part of, the public domain." Act of Feb. 22, 1889, § 10, 25 Stat. 676

The 1901 agreement did not contain a school lands provision. However, Senator Gamble from South Dakota proposed, and the Senate adopted a school lands provision in 1902. Senator Gamble explained to the Senate the reason for his amendment:

> "Under the provisions of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the land restored to and became a part of the public domain. This would withdraw about 29,000 acres of these lands and would leave 387,000 acres to be opened to settlement and which would be affected by the proposed amendment." 35 Cong.Rec. 3187 (1902).

Here is an unequivocal statement and corresponding action by the Senate of the United States premised solely and only upon the fact that the title of the Indians was extinguished and the lands restored to the public domain. It is a strong indication by Congress that its intention was to diminish the size of the Rosebud Reservation. The amendment was adopted without discussion, again

buttressing the impression that the diminution of the Rosebud Reservation was a premise upon which all members of Congress acted when enacting the various Indian acts.

And again, when the school lands provision was proposed in the House of Representatives and a Rep. Finley questioned the appropriation for those school lands, Congressman Burke, a member of the House Committee on Indian Affairs, and a South Dakotan, responded:

> "I am glad that the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union, it was provided that sections 16 and 36 in said state should be reserved for the use of the common schools of that state, and it further provided that as to the lands within an Indian reservation the portions of that grant would not become operative until the reservation was extinguished and the lands restored to the public domain. That enabling act was passed by Congress on the 22nd day of February, 1889. In March of that same year, Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or twelve million acres of land, and made an express appropriation, in accordance with that enabling act, to pay outright out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the Treaty. Mr. Finley . . . 'Then as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union. Mr. Burke, 'Yes', Mr. Finley, "and not otherwise?' Mr. Burke, 'no'." 38 Cong.Rec. 1423 (1904).

[1073]

The plaintiff herein makes reference to a statute (43 U.S.C.A. § 865) which provides for the granting of school lands in opened reservations that are not restored to the public domain. This statute is not in point for it allows the state to *select* lands for school purposes *prior* to the opening of such reservation. However, the 1904 Act specifically referred to sections 16 and 36 in its granting of school lands and its legislative history indicates it was done in response to South Dakota's enabling act. This Court feels that 43 U.S.C.A. § 865, in fact, lends weight to the argument that the express grant of school lands in the 1904 Act bolsters its position. Had Congress merely been "opening" the reservation for settlement, it could have used 43 U.S.C.A. § 865 to supply the state of South Dakota with school lands. This method was not used, however.

The school lands provision stands as a clear indication of congressional intent to restore Gregory County to the public domain. *See*, United States ex rel. Condon v. Erickson, 478 F.2d 684, 686 (8th Cir. 1973). Other congressional enactments express the same intention, however.

Subsequent Enactments

In 1905 Congress passed an act to extend the time in which settlers could establish their residence in Gregory County under the homestead acts. As will be

seen in the following quotations, there is a clear expression from Congress therein that Gregory County had ceased to be considered in the "congressional mind" as reservation or "Indian land". In Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973), the Supreme Court discussed subsequent legislation to bolster its opinion that the reservation at issue therein had not been extinguished. In Senate Report No. 2760, 58th Cong., 3rd Sess., p. 1 (1905), the following appears:

> "The Committee on Public Lands, to whom was referred the bill to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were *heretofore a part of the Rosebud Reservation*, within the limits of Gregory County, South Dakota, having had the same under consideration, beg leave to report the bill back with the recommendation that it be amended, and that as amended it do pass." (Emphasis added)

Senator Gamble, in remarks before the Senate, found at 39 Cong.Rec. 1578 (1905), said the following:

> "I ask unanimous consent for the present consideration of the bill to provide for the extension of time within which homestead settlers may establish their reservation upon certain lands which *were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, South Dakota . . .*" (Emphasis added)

The operative language of the Act of February 7, 1905, ch. 545, 33 Stat. 700 is as follows:

> "An act to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which *were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County. . . .*" (Emphasis added)

Here then, is another clear indication that the Congress of the United States considered the reservation nature of Gregory County extinguished. Congress, in its act, had referred to this land as heretofore a part of the reservation.

Conclusion

[1074] This Court is of the opinion that the contemporary history of the 1904 Act indicates a congressional intent to extinguish that portion of the reservation. The defendant's brief reveals several contemporary documents and sources that buttress this opinion. At no time can this Court find an express discussion of state versus federal jurisdiction over the lands in question. However, the whole tenor of the discussion in Congress convinces this Court that the purpose was to "do away" with the reservation in this area. This Court is convinced that the only interest that the Rosebud Sioux Tribe retained in the Gregory County lands was to be in the proceeds from the sale of those lands. There was never any question in anyone's mind but that the lands would be sold. At this time the demand for land for settlers was great.

The case of Ash Sheep Co. v. United States, 252 U.S. 159, 40 S.Ct. 241, 64 L. Ed. 507 (1920) is not in point. The act in question therein contains several provisions which the 1904 Act does not. *Ash Sheep* itself recognized that each treaty must be judged by itself.

That being the case, it is this Court's judgment that the confines of the Rosebud Sioux Reservation were diminished by the 1904 Act and the reservation or Indian land nature was extinguished therein, and Gregory County restored to the public domain.

1907 ACT

(Tripp and Lyman Counties)

On March 12, 1907 Congress passed an act concerning Tripp County and a portion of Lyman County. Each treaty or act must be analyzed separately to determine congressional intent. *See*, United States v. Ash Sheep Company, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920); Kills Plenty et al. v. United States, 133 F.2d 292, 295 (8th Cir. 1943).

The operative language of the 1907 Act is as follows:

> "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be and is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of Range twenty-five West of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians . . ."

Again, this Court should examine the history of the 1907 Act to determine congressional intent.

Negotiations

In 1906 Inspector James McLaughlin conducted negotiations with the Rosebud Sioux Indians for the cession of their unallotted lands in Tripp and Lyman Counties. Inspector McLaughlin was the very person who conducted the negotiations for the 1901 agreement and the 1904 Act. It is interesting to note that the transcript of their discussion adds weight to this Court's conclusion that the 1904 Act diminished and extinguished the Rosebud Reservation. The following quotation is found on page 5 of the hearing transcript held at the Rosebud Agency in 1906:

> "Inspector McLaughlin . . . . There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation boundary, but should it come into your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory County whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments. So you need not worry about that, my friends." Dec. 14, 1906, Rosebud Agency Hearing by

James McLaughlin, U. S. Indian Inspector, page 5.

It appears then that Inspector McLaughlin's assumption was that Gregory County was no longer a part of the Rosebud Sioux Reservation.

[1075] The Indian people during the negotiations expressed concern for the need of their land. Statements made by various Indians again buttressed this Court's opinion that the 1904 Act, in fact, diminished the reservation. A prime example is the following quotation:

"High Pipe: . . . . My friends, our Gregory County payment lasts two years yet. We all know that. The best land we have is in the eastern part of our reservation, Tripp County. The Indian people want to get land for their children there. They are very anxious to get land for their children down there." *Rosebud Hearing*, 1906, *supra*, page 8.

So it can be seen that the Indian members at this time recognized Tripp County as the eastern portion of their reservation. Gregory County does, of course, lie east of Tripp County. *See* map appended to this opinion. It is difficult for one to read the transcript of the negotiations in 1906 without feeling that this was merely a continuation of the original negotiation in 1901 which culminated in the Gregory County act, the 1904 Act, discussed above. That plainly is the import of all the discussion held therein. Chief Picket Pin, after discussing the Great Father's need for land said: "My friend, you are going home this time without any land." *Rosebud Hearing*, 1906, *supra*, page 7. The 1907 Act was clearly a continuation of the policies followed in the past. Not only the transcript of the negotiations for the 1907 Act indicate this conclusion, but the congressional history as well.

Congressional History

There are many statements contained in the Congressional Record and various congressional reports which indicate an intent by Congress to diminish the confines of the Rosebud Reservation yet another time. As stated in H.R.Rep.No. 7613, 59th Cong., 2nd Sess. p. 1 (1907):

"The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects all that portion of the reservation east of Range 25 of the 5th Principal Meridian south of the Big White River and embraces about one million acres.

In the second session of the 58th Congress a law was passed authorizing a sale of so much of this same reservation as was located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County."

The exact same statement may be found in S.Rep.No.6838, 59th Cong., 2nd Sess., p. 1 (1907). In addition, Congressman Burke stated on February 16, 1907, the following:

"Mr. Burke from South Dakota . . . . Mr. Speaker, the bill has the unanimous report of the Committee on Indian Affairs, in which committee it was very carefully considered. The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by 42 more than a majority of the male Indians over the age of 18 years. It is in line with recent bills that have been passed affecting the sale of Indian Reservations. . . . The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. *They will have left, after this land is disposed of, a reservation that is substantially fifty miles square,* and there are only 5,000 Indians." 50 Cong.Rec. 3104 (1907). (Emphasis added)

It can be seen, upon examining a map, that the quotation "fifty miles square" referred to in the quote relates approximately to the size of the reservation minus Gregory, Tripp and Lyman Counties. Mellette and Todd County make up a generally square area, roughly fifty miles on a side. Again, one can see the continuous policy with relation to the Rosebud Indian Reservation in opening the reservation, diminishing the reservation, and extinguishing the reservation nature of the lands concerned.

[1076]

School Lands

Again, in the 1907 Act, the act makes provision for school lands as did the 1904 Act. The congressional committee

reports state that the school land provision contained in the 1907 Act is for the same reason that the school land provisions were included in the 1904 Act already referred to and discussed above. The following report can be found at H. R.Rep.No.7613, 59th Cong., 2nd Sess., pp. 3–4 (1907), and S.Rep.No.6838, 59th Cong., 2nd Sess., p. 3, (1907):

"Section 6 of the bill reserves sections 16 and 36 in each township for the use of common schools, and grants the same to the State of South Dakota. And section 7 makes an appropriation to pay for the same at $2.50 per acre. This is following the precedents which have heretofore been established in the opening of other reservations in South Dakota, and is based upon section 10 of the Act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:

'Sec. 10. That upon admission of each of said states into the Union, sections 16 and 36 in every township of said proposed states, and where such sections, or any portion thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, or other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legisla-

ture may provide, with the approval of the Secretary of the Interior: provided that the 16th and 36th sections embraced in permanent reservations for national purposes shall not at any time be subject to grants nor indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or the indemnity provisions of this act until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.' "

Here again in the 1907 Act we have both the House and Senate reports on the bill referring specifically to the extinction of the reservation and the restoration of those lands to the public domain. This is a clear indication of congressional intent.

Allotments

In the case of Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973) the Court discussed the allotment provisions of the treaties involved. The Court in *Mattz* said:

> "The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C. § 1151, defining Indian country notwithstanding the issuance of any patent therein." 412 U.S. 481, 504, 93 S.Ct. 2245, 2257, 37 L.Ed.2d 92.

There are allotment provisions in the 1907 Act. In Section 2 the following was stated:

> ". . . provided, that prior to said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation. . . . ."

The clear import of that section is that the Indians in the portion soon to be opened, were allowed to relinquish that part of the reservation and remove to the diminished portion of the reservation. The 1910 Act, to be discussed hereinafter, made that alternative explicit. It is clear that after that portion of the reservation had been opened, the land would be disposed of under the general homestead and townsite provisions and laws and that there would be from that time after no further allotments made in this area. The allotment provisions provided for or discussed in *Mattz* are as follows:

[1077]

> "Provided, That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment . . . . and the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians . . . . "

See, 412 U.S. 481, 495, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92.

It is clear from that quotation that the act in question contemplated a continuing presence or at least the option to the Secretary of the Interior to declare a continuing presence of reservation in the area opened. No such provision is made in the 1907 Act herein. In fact, the import of the act contemplates no such continuing area that may be "set apart . . . for the permanent use and occupation . . ." of the Indian. The allotment section in the 1907 Act merely allows the Indians the option to keep the allotment that they then had or give up that allotment and remove to some other portion of the reservation *prior* to the proclamation of the Act. *See*, Sec. 2, Act of March 2, 1907. As can be seen from page 17 of the transcript of the hearing conducted by the Inspector McLaughlin with the Indians concerning the 1907 Act, the allotment provisions contained therein are to assure that all Indians within the Rosebud Reservation who had not before been allotted lands would receive such lands before such time as the settlers were allowed to homestead in the area. *See* Dec. 14, 1906, Rosebud Agency Hearing by James McLaughlin, U. S. Indian Inspector, p. 17. There is no provision in the 1907 Act for continuing allotment provisions.

Subsequent Enactments

And again, subsequent laws enacted by Congress refer to Tripp County as "formerly within the Rosebud Reservation." *See*, Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92

(1973). The Act of January 11, 1915, 38 Stat. 792, is such an act:

> "An Act Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, *formerly a part of the Rosebud Indian Reservation* in South Dakota.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals known as kaolin, kaolinite, fuller's earth, china clay and ball clay, in Tripp County *in what was formerly within the Rosebud Indian Reservation in South Dakota*, and has heretofore been opened to settlement and entry under Acts of Congress which did not authorize the disposal of such minerals. . . ." (Emphasis added)

Here then, is a subsequent act of Congress which specifically refers to Tripp County as having been separated from the Rosebud Reservation. It is a clear indication of the intent of Congress. Again, in the Act of August 17, 1911, Ch. 22, 37 Stat. 21, the language is as follows:

> "Be it enacted . . . that any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation, in the State of South Dakota, authorized by Act approved March second, nineteen hundred and seven. . . ."

The above must be taken as a clear indication of congressional intent with regard to the extinction of the reservation nature of the lands in Tripp County.

[1078] Really no clearer indication could be asked for than acts of Congress which refer to the 1907 Act and to Tripp County as formerly within the confines of the Rosebud Reservation.

The defendants' brief contains numerous citations to other letters and reports of various government officials and agencies which constantly refer to the Tripp County section of the Rosebud Reservation as having been separated from the reservation, or having been formerly within the reservation. These contemporary documents must lend credence to the defendant's argument that it was, in fact, the intent of Congress to diminish the Rosebud Reservation once again by means of the 1907 Act. Again, the whole tenor of the contemporary documents seem to suggest to this Court that it was, in fact, the intent of Congress to diminish the Rosebud Reservation. The transcripts of the hearings held in 1906 and 1907 by Inspector McLaughlin constantly refer to the Gregory County Act and that taking in the same vein as the taking in 1907 by the Tripp County Act. There seems to have been no question to the participants in those conferences but that the land would no longer be considered reservation land. There is the reference in the hearing transcript to Tripp County being the eastern section of the reservation and that this eastern section would then be taken. The congressional debates once

again seem to simply assume and have as their underlying premise that the separation and opening of Tripp County would work a diminution of the reservation. This Court is of the opinion that the surrounding circumstances, the congressional history and the contemporary documents of the 1907 Act clearly indicate the intention of Congress to diminish the Rosebud Reservation and extinguish the reservation nature of those lands in Tripp and Lyman Counties.

1910 ACT

(Mellette County)

Again, in 1910 Congress turned its eye to the Rosebud Reservation. Again the pressures for land for settlers were great, not only from the South Dakotans, but from people from the east who wished to move west. The response to this pressure was yet another bill to open the Rosebud Reservation for homestead settlement. The operative language of the 1910 Act is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, . . ."

Again, this Court must examine the Congressional Record and other contemporary history of the passing of the

1910 Act to determine the intent of Congress with respect to that act.

Congressional Statements

In January of 1910, Senator Crawford, discussing the Rosebud Reservation, made the following statement in the Congress of the United States:

> "Mr. Crawford . . . By treaties negotiated from time to time, and by laws enacted from time to time, the area of lands occupied by the Indians has gradually narrowed to smaller and smaller limits until now the lands owned by the Indians are comparatively small in quantity. They are not lands which in their possession bring any revenue whatever. They do not cultivate them. They neither fish nor game upon them. The policy of the government toward the Indians and toward these lands has changed in more recent years simply in this respect—that the land be sold and the proceeds be made into a trust fund, the principle forever held inviolate and the income from which is devoted to the Indians . . . ." 45 Cong. Rec. 1068 (1910).

By this statement one can see the indication that Congress considered the
[1079] openings in the three acts discussed so far to be a continuous process of narrowing the range upon which the Indians would roam and "civilizing" that part of the western United States. The statement above stands mainly for the proposition that each of the acts must be viewed in light of the other.

In Senate Report No. 887, 60th Cong., 2nd Sess., pp. 1–2 (1909), the following

report is made to the Senate of the United States concerning what was to become the 1910 Act:

> "The present area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The land proposed to be opened to settlement under the provisions of this bill embrace an area of about 900,000 acres. . . . It was at first contemplated to submit this bill, through an Indian inspector, for the consideration of the Rosebud Indians, but the Inspector, who for a number of years has had that especial work in charge, is otherwise occupied and has been unable to take it up and it is felt by the Committee that the provisions of the bill are fair and just to the Indians in all respects, and it would delay the consideration of the matter unduly if the action were withheld for that purpose and the measure could not receive consideration during the present session of Congress.
>
> "The reservation is yet large, and in the judgment of your Committee the surplus and unallotted lands are unnecessary for the use of the Indians . . . . . It also provides that the Secretary of the Interior, in his discretion, may permit Indians who have an allotment *within the area proposed to be opened to relinquish such allotment and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished.*" (Emphasis added).

And in a report in the House of Representatives, H.R.Rep.No.429, 61st Cong.,

2nd Sess. p. 2, (1910), the following statements are made:

"The Rosebud Indian Reservation when set aside as a separate reservation under the Sioux Act of 1889, contained something over 3,000,000 acres of land. In 1904 the unused and unallotted portion of the reservation in Gregory County, about 500,000 acres, was disposed of and the Indians received therefrom something more than $1,500,000. In the 59th Congress a law was enacted authorizing the sale of the unused and unallotted lands in that portion of the reservation in Tripp County, comprising about 1,000,000 acres, under a bill substantially in the same form as the bill now under consideration, except that the price of the land was fixed in the law, whereas under this bill the price is to be fixed by appraisement. . . .

"The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. *There will still be left a reservation containing 1,000,000 acres,* and as the Indians have all been allotted, there is no occasion for continuing a reservation larger than it will be when Mellette County is disposed of." (Emphasis added).

Here, perhaps, is the strongest statement yet in a House of Representatives committee report concerning each of the acts in question, in this Court's opinion. The committee starts by saying that the reservation was once 3,000,000 acres of

land and finishes by saying that after the passage of the 1910 Act the reservation would contain only 1,000,000 acres. The report says that there is no need for a continuing of a reservation larger than the one that will result after the opening and disposal of the land in Mellette County. There can be little question from reading this House Report but that the House of Representatives contemplated a diminished reservation by not only the 1910 Act, but the acts passed in 1904 and 1907 as well. In addition, Mr. Burke from South Dakota made the following statement during the debates on the 1910 Act:

"I might say, Mr. Speaker, that there are two propositions to be considered
[1080] in disposing of the unallotted and unused lands on Indian reservations. One is at the earliest possible date, to get among the Indians, the white men and have those lands that are of no benefit to anyone that are lying idle, doing no good, opened up and developed into farms, and I believe that the placing through what were heretofore reservations, actual settlers, will have the effect of civilizing the Indians who will have allotments and also give value to those allotments which at present are of little value." 45 Cong. Rec. 5457 (1910)

School Lands

Again, the 1910 Act provides for school lands as did the 1904 and 1907 Acts. The Senate Report No. 887, 60th Cong., 2nd Sess., p. 2 (1909) provides:

"Section 16 and 36 of the lands in

each township are not to be disposed of, but are reserved for the use of the common schools of the state, and these lands are to be paid for by the government in conformity with the provisions of the act admitting the State of South Dakota into the Union."

H.R.Rep.No.429, 61st Cong., 2nd Sess., p. 2 (1910), states almost the identical language in its report to the House concerning the bill. This Court has discussed in the sections on the 1904 and 1907 Act what it feels the import of the school lands provision is. Certainly the enabling act which admitted South Dakota to the Union discussing the disestablishing of the reservation and its return to the public domain must be a strong indication of congressional intent in this regard.

Intoxicants

Section 10 of the 1910 Act prohibits the introduction of intoxicants into the lands concerned with in this act. There is no dispute but that at this time there were federal laws prohibiting the introduction of all forms of intoxicants into "Indian country". The plaintiff would attach to this provision the congressional intent to continue the lands in Mellette County as Indian lands. This Court thinks, on the contrary, that the limiting of the prohibition of intoxicants to 25 years, clearly indicates an intent of Congress that this was not to be considered henceforth Indian land. Evidently Congress felt that it must provide a special section to prohibit such intoxicants for a period of time to protect the Indians who still had allotted lands in that area. If Mellette County continued to be "Indian land", why would Congress feel the need to enact a specific act continuing the liquor prohibition, but only continuing it for a period of years? An eminent scholar on Indian law has the answer to that question:

"In connection with the power to regulate commerce with the Indian tribes there exists also the authority granted by the Constitution to do all things necessary and proper by way of carrying out its provisions. Pursuant to this power and the power over the territory and other property belonging to the United States, the federal government has imposed liquor restrictions on land ceded to it by the Indians when these lands adjoined Indian country. The purpose of this measure was to prevent sale of liquor on the boundaries of the land retained by the Indians. Except for these extensions of the liquor laws into 'buffer' areas the states would have had the exclusive police power thereon. Such extensions have been repeatedly upheld by the Supreme Court." F. Cohen, Handbook of Federal Indian Law, (University of New Mexico Press), p. 353 (1942 ed).

An interesting and enlightening discussion concerning the liquor provisions is found at 45 Cong.Rec. 5463–64 (1910):

"Mr. Goebel. . . . I am opposed to attaching to the sale of any reservation, conditions such as are proposed in this bill. Mr. Gronna. . . .

> Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold? Would the gentleman not buy land on a reservation where protection is given by the
> [1081] government, even if such reservation is located in a prohibition state?
>
> Mr. Goebel . . . . Oh, I do not know what I would do. At present I want to get the land without any conditions attached. *You must also bear in mind that when the lands are sold, there is no longer a reservation and the laws of the state apply.* . . .
> Mr. Butler. . . . If the land is sold it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood, and for that purpose I propose in a kind and gentle way to suggest to gentlemen that if there is to be an attempt made to prevent a restraint being imposed upon this title, they had better have a quorum of the House present to insure the success of the attempt." (Emphasis added).

Clearly this discussion indicates that the participants did not feel that the lands to be ceded and opened were reservation but that the liquor prohibition should be continued and remain so that the Indians who had an allotment in Mellette County would not be exposed to or affected by or tempted by "demon rum". It is this Court's opinion that the Indian agency and Indian schools provided for in Section 1 of the 1910 Act also fit within

this rationale. Congress knew that various members of the Rosebud Sioux Tribe had taken allotments in the lands soon to be ceded, and these provisions attempted to continue to provide for those people in that area, although the land would no longer be considered as reservation.

Allotments

This Court has discussed, in relation to the allotment sections of the 1907 Act, the United States Supreme Court's recent opinion in the case of Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L. Ed.2d 92 (1973). In the *Mattz* opinion the Supreme Court made reference to the continuing nature of the allotment provisions to buttress its opinion that the Congress of the United States had no intention to extinguish the reservation nature of the lands involved. The 1910 Act which we are concerned with herein, also has certain allotment provisions contained in it.

> "Provided, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation*:" (Emphasis added.)

This allotment section is addressed in Senate Report No. 887, 60th Cong., 2nd Sess., p. 2 (1909):

> "It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment within the area proposed to be opened

> to relinquish such allotments and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished."

This whole concept seems to be contrary to the concept that Mellette County continued as reservation land. In fact, in this Court's opinion, this allotment section provides the strongest indication yet that the area in question was no longer to be considered "Indian land". Congress, in effect, offered to allow Indians to exchange and take their allotments in what would continue to be Indian land so that they might continue to benefit from all of the programs that the government had on the reservation. They need not retain their allotment in what was no longer to be considered a reservation. Clearly there is no other reasonable explanation for such a provision.

Subsequent Enactments

As with the other acts described herein, subsequent acts of Congress lend credence and buttress this Court's opinion as to the effect of the 1910 Act. The
[1082] Act of March 3, 1919, 40 Stat. 1320, provided as follows:

> "The Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetary Company, for cemetary purposes, for a price not less than the appraised value thereof, a ten-acre tract within the former Rosebud Indian Reservation in Mellette County, South Dakota, described as the northeast quarter of

> the southeast quarter of the northeast quarter of section thirty-four, township forty-two north, range twenty-nine west, sixth Principal Meridian, or such part thereof as may be required:"

Again, this is an indication that Congress regarded Mellette County as having been separated from the Rosebud Reservation and restored to the public domain. *See*, Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973).

Conclusion

Again, the defendant cited to this Court reports and letters from various government bodies, officials and interested people which tend to confirm this Court's opinion that Mellette County was intended to be severed from the reservation and returned to the public domain. The school lands section, the intoxicants section, the allotments section all lend credence to this Court's opinion. This Court feels that the clearest indication yet of the congressional intent to diminish the Rosebud Reservation is expressed in the 1910 Act and the congressional history surrounding that act. It is clear from the congressional history that Congress viewed the 1904, the 1907 and the 1910 Acts as one continuous program of reducing the size of the various Indian reservations in the State of South Dakota so that settlers from the east could come in and acquire the land they so hungered for and so that the Indian people of South Dakota would become "more civilized". There is no

doubt in this Court's mind, after having reviewed the contemporary documents from the passage of the 1910 Act, and the congressional history thereof, that the Congress of the United States had the intention of diminishing the Rosebud Reservation and restoring Mellette County to the public domain under the jurisdiction of the State of South Dakota thereby.

CONCLUSION

The plaintiff brought this declaratory judgment action seeking declarations that the acts of Congress discussed herein, did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the Act of March 2, 1889. This Court has felt compelled to investigate and examine the legislative history of the three acts in question in order to make a determination in this action. *See*, Mattz v. Arnett, *supra*; Seymour v. Superintendent, *supra*; and United States ex rel. Feather v. Erickson, *supra*. As the United States Supreme Court said in the *Mattz* case, "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L. Ed.2d 92. It is this Court's opinion after having examined all the contemporary legislative materials, various government reports and discussions that the whole context of the acts from 1904 through 1910 had but one purpose in mind. It is clear that the purpose of those acts was to open those reservations to non-Indian

settlers and to civilize those areas in what the Congressmen obviously regarded as an uncivilized portion of the United States. As each successive act was proposed in Congress various reports referred to a continuing diminished size of the Rosebud Reservation. Originally the reservation was said to comprise 3,000,000 acres, and later 1,800,000 acres, and finally to comprise a reservation roughly the size of 1,000,000 acres. The allotment sections, the school lands provisions, the many negotiations conducted by Inspector McLaughlin, the congressional reports and debates, and
[1083] the subsequent congressional enactments for each act lead this Court to believe and be of the opinion that the surrounding legislative history and the circumstances *clearly* indicate a congressional intent to separate each of the counties concerned, to return those counties to the public domain, and to extinguish the reservation or "Indian land" nature of those counties thereafter.

Certainly this is the treatment that has been accorded those counties from the time of the acts' passage on. There is no dispute but that the State of South Dakota has treated the counties of Mellette, Tripp, Gregory and what was at that time Lyman County, as portions of the state over which the State of South Dakota can exercise jurisdiction since the passage of those acts. In fact, the Eighth Circuit Court of Appeals has in the past assumed, but clearly without deciding, that Todd County was the Rosebud Reservation and that other acts had affected the territorial nature of the

reservation. In Beardslee v. United States, 387 F.2d 280, 285 (8th Cir. 1967), the Court said:

> "All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three acts of Congress have affected the territory of the reservation since its establishment in 1889 and none of these concern Todd County."

The Court then went on to cite the very three acts which this Court is concerned with herein. The above is cited not for the fact that the Eighth Circuit had decided the jurisdictional questions herein, but only for the fact that the jurisdictional boundaries were treated by common usage, to have been diminished by the three acts in question. This is distinguished from the situation in *Seymour*. *See*, Seymour v. Superintendent, 368 U.S. 351, 359, 82 S.Ct. 424, 7 L.Ed. 2d 346 (1962).

This Court feels that the following report by the Commissioner of Indian Affairs cited to this Court by the defendants and given in 1912 is very enlightening upon the whole subject discussed at length herein:

> "Under various acts passed by Congress within recent years, certain lands ceded by the Indians to the United States are open to settlement and entry, and the government endeavors to dispose of them at their appraised value to the benefit of the Indians.

> "Nearly all such acts contain a clause practically identical with the following:
>
> > 'That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described . . . or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided.'
>
> "It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the Indians' title thereto extinguished. On this theory the public at large has come to consider said lands a part of the public domain, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.
>
> "By *departmental decision* of November 27, 1911, it was held in effect that the Indians' title to such land is not extinguished until the date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale or entry." Report of the Commissioner of Indian Affairs, p. 51 (1912). (Emphasis added).

The Commissioner did not question that the lands returned to the public domain but only when they did so.

[1084] This Court has examined the issues involved here very closely. The decision herein affects a large portion of the State of South Dakota. The decision will have great political, social, cultural and economic effects. From the time these acts were passed, these counties have been treated as outside the Rosebud Sioux Reservation by the settlers, their descendents, the State of South Dakota and the federal courts.

There can be little doubt but that the members of Congress coveted Indian lands. This Court must determine the intent of Congress as it existed at the turn of the century. Time and again the Indians were given reservations, only to have the settlers' need for land mandate a redefining of the reservation boundaries. While this Court does not necessarily agree with the mores or the methods employed at that time, there is little doubt that the congressmen were engaged in the process with the "doing away" of the reservations. This Court's only function is to determine congressional intent, not to rewrite history.

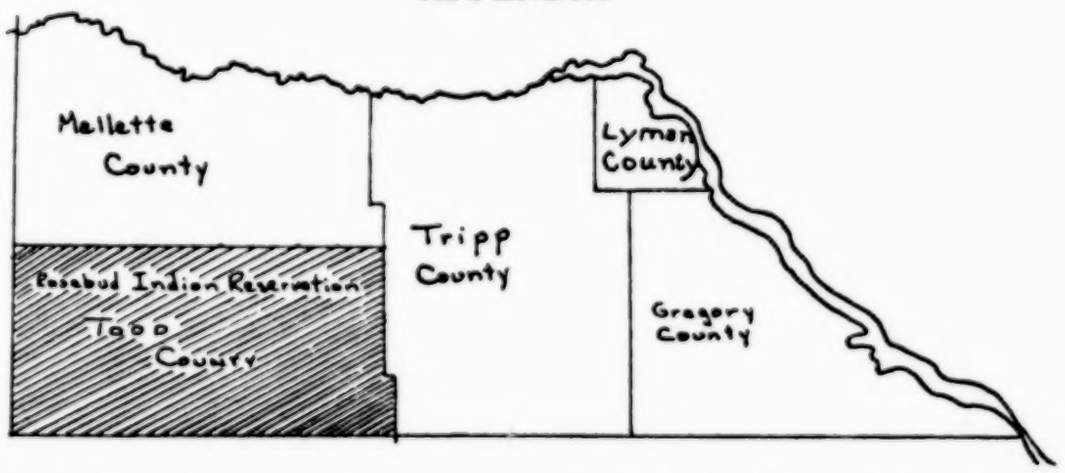
[7] This Court is aware of the many decisions that various courts have rendered regarding the jurisdictional boundaries of various Indian reservations. However, each congressional act and treaty is different and must be so examined. As the Eighth Circuit Court of Appeals said in Kills Plenty, et al. v. United States, 133 F.2d 292, 295 (8th Cir. 1943):

> "It can, of course, be argued that the words 'within the limits of any Indian reservation' should mean the same thing in any statute, but the argument, we think, is unsound. . . . To find that meaning the words must be viewed in their setting, and the history and purpose of the Act must be considered."

The surrounding circumstances, the history, congressional and otherwise, and various documents, convince this Court that the three acts in question did diminish the Rosebud Sioux Reservation and that the State of South Dakota can exercise jurisdiction over Indian people in the counties of Gregory, Tripp, Mellette, and what was Lyman.

The defendants herein shall forthwith prepare the necessary papers to effectuate the opinion of this Court as expressed in this Memorandum Opinion.

APPENDIX



The unshaded portion of the map represents those areas of the original reservation opened to settlement by the homestead acts.

Judgment Entered February 15, 1974 in the United States District Court for the District of South Dakota

This matter was brought on before this Court on briefs and without a jury. The Rosebud Sioux Tribe brought this action for declaratory judgment pursuant to 28 U.S.C. sec. 2201-et seq, seeking declarations that three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the act of March 2, 1889. The defendant, the State of South Dakota and the counties of Mellette, Lyman, Tripp and Gregory, asserted that the three acts did diminish the Rosebud Reservation so that the reservation presently embraces only Todd County, South Dakota.

The Court having studied and examined the briefs submitted by the respective parties, having researched this matter, and having made, entered and filed its Memorandum Opinion which shall also serve as Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the three acts in question, the 1904 Act (Gregory County) 33 Stat. 254, the 1907 Act (whole of Tripp County and part of Lyman County) 34 Stat. 1230, the 1910 Act (Mellette County) 36 Stat. 448, did extinguish the reservation or "Indian land" nature of the unallotted surplus lands in said counties by returning them to the public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to coincide with the boundaries of Todd County, South Dakota.

Dated this 15th day of February, 1974.

BY THE COURT:
Andrew W. Bogue
United States District Judge

APPENDIX C-1

[Act of April 23, 1904, c. 1484, 33 Stat. 254, 3 Kappler 71]

[71] CHAP. 1484.—An act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.

Whereas James McLaughlin, United States Indian inspector, did, on the fourteenth day of September, anno Domini nineteen hundred and one, make and conclude an agreement with the male adult Indians of the Rosebud Reservation, in the State of South Dakota, which said agreement is in words and figures as follows:

This agreement made and entered into on the fourteenth day of September, nineteen hundred and one, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Sioux tribe of Indians belonging on the Rosebud Reservation, in the State of South Dakota, witnesseth:

ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand (416,000) acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement the United States stipulates and agrees to expend for and pay to said Indians, in the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars.

[72] ARTICLE III. It is agreed that of the amount to be expended for and paid to said Indians, as stipulated in Article II of this agreement, the sum of two hundred and fifty thousand (250,000) dollars shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as

possible among men, women, and children as soon as practicable after the ratification of this agreement, and that the sum of seven hundred and ninety thousand (790,000) dollars shall be paid to said Indians per capita in cash in five annual installments of one hundred and fifty-eight thousand (158,000) dollars each, the first of which cash payments shall be made within four months after the ratification of this agreement.

ARTICLE IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation; and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

ARTICLE V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

ARTICLE VI. This agreement shall take effect and be in force when signed by U. S. Indian Inspector James McLaughlin and by three-fourths of the male adult Indians parties hereto, and when accepted and ratified by the Congress of the United States.

In witness whereof the said James McLaughlin, U. S. Indian inspector, on the part of the United States, and the male adult Indians belonging on the Rosebud Reservation, South Dakota, have hereunto set their hands and seals at Rosebud Indian Agency, South Dakota, this fourteenth day of September, A. D. nineteen hundred and one.

JAMES MCLAUGHLIN,
U. S. Indian Inspector.

No.	Name.	Mark.	Age.
1	He Dog	x	65
2	High Hawk	x	50
3	Black Bird	x	62
	(and 1,028 more Indian signatures.)		

We, the undersigned, hereby certify that the foregoing agreement was fully explained by us in open council to the Indians of the Rosebud Agency, South Dakota; that it was fully understood by them before signing, and that the foregoing signatures, though names are

similar in some cases, represent different individuals in each instance, as indicated by their respective ages.

WILLIAM BORDEAUX, Official Interpreter.
WM. F. SCHMIDT, Special Interpreter.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

[73] We, the undersigned, do hereby certify that we witnessed the signatures of James McLaughlin, United States Indian inspector, and the 1,031 Indians of the Rosebud Agency, S. Dak., to the foregoing agreement.

FRANK MULLEN, Agency Clerk.
C. H. BENNETT, Farmer, Cut Meat District.
JOHN SULLIVAN, Farmer, Black Pipe District.
FRANK ROBINSON, Farmer, Little White River District.
FRANK SYPAL, Farmer, Butte Creek District.
ISAAC BETTELYOUN, Farmer, Big White River District.
JAMES A. MCCORKLE, Farmer, Ponca District.
LOUIS BORDEAUX, Ex-Farmer, Agency District.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

I certify that the total number of male adult Indians over 18 years of age belonging on the Rosebud Reservation, S. Dak., is 1,359, of whom 1,031 have signed the foregoing agreement, being 12 more than three-fourths of the male adult Indians of the Rosebud Reservation, S. Dak.

CHAS. E. MCCHESNEY,
United States Indian Agent.

ROSEBUD AGENCY, S. DAK., October 4, 1901.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended and modified, as follows:

"ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point

of beginning, the unallotted land hereby ceded approximating four hundred and sixteen thousand acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

"ART. II. In consideration of the land ceded, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same to settlers under the provisions of the homestead and town-site laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre.

"ART. III. It is agreed that of the amount to be derived from the sale of said lands to be paid to said Indians, as stipulated in article two of this agreement, the sum of two hundred and fifty thousand dollars
[74] shall be expended in the purchase of stock cattle, of native range or graded Texas two-year-old heifers and graded Durham or Hereford two-year-old bulls, for issue to said Indians, to be distributed as equally as possible among men, women, and children, but not more than one half of the money received in any one year shall be expended as aforesaid, and the other half shall be paid to said Indians per capita in cash, and an accounting, settlement, and payment shall be made in the month of October in each year until the lands are fully paid for and the funds distributed in accordance with this agreement: *Provided, however,* That not more than five hundred thousand dollars shall be expended or paid within two years after the ratification of this agreement, and not to exceed one hundred and fifty thousand dollars in each of the following years until the expiration of five years.

"ART. IV. It is further agreed that all persons of the Rosebud Indian Reservation, South Dakota, who have been allotted lands and who are now recognized as members of the tribe belonging on said reservation, including mixed-bloods, whether their white blood comes from the paternal or maternal side, and the children born to them, shall enjoy the undisturbed and peaceable possession of their allotted lands, and shall be entitled to all the rights and privileges of the tribe enjoyed by full-blood Indians upon the reservation; and that white men heretofore lawfully intermarried into the tribe and now living with their families upon said reservation shall have the right of residence thereon, not inconsistent with existing statutes.

"ART. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

SEC. 2. That the lands ceded to the United States under said agreement, excepting such tracts as may be reserved by the President, not exceeding three hundred and ninety-eight and sixty-seven one-hundredths acres in all, for subissue station, Indian day school, one Catholic mission, and two Congregational missions, shall be disposed

of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, four dollars per acre, to be paid as follows: One dollar per acre when entry is made; seventy-five cents per acre within two years after entry; seventy-five cents per acre within three years after entry; seventy-five cents per acre within four years after entry, and seventy-five cents per acre within six months after the expiration of five years after entry. And upon all land entered or filed upon after the expiration of three months and within six months after the same shall be opened for settlement and entry, three dollars per acre, to be paid as follows: One dollar per acre when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years
[75] after entry; fifty cents per acre within four years after entry, and fifty cents per acre within six months after the expiration of five years after entry. After the expiration of six months after the same shall be opened for settlement and entry the price shall be two dollars and fifty cents per acre, to be paid as follows: Seventy-five cents when entry is made; fifty cents per acre within two years after entry; fifty cents per acre within three years after entry; fifty cents per acre within four years after entry, and twenty-five cents per acre within six months after the expiration of five years after entry: *Provided,* That in case any entryman fails to make such payment or any of them within the time stated all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and held for cancellation and the same shall be cancelled: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry, as now provided by law, where the price of the land is one dollar and twenty-five cents per acre: *And provided further,* That all lands herein ceded and opened to settlement under this act, remaining undisposed of at the expiration of four years from the taking effect of this act, shall be sold and disposed of

for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one purchaser.[1]

SEC. 3. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and paid to the Rosebud Indians or expended on their account only as provided in article three of said agreement as herein amended.

SEC. 4. That sections sixteen and thirty-six of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in said county of Gregory are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract herein ceded, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 5. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section four of this act.

SEC. 6. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein; or to guarantee to find purchasers for said lands, or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

Approved, April 23, 1904.

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[1] 38 L. D., 213.

APPENDIX C-2

[Act of March 2, 1907, c. 2536, 34 Stat. 1230, 3 Kappler 307]

[307] CHAP. 2536.—An act to authorize the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians: *Provided*, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

SEC. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, and he shall also allot one hundred and sixty acres of land to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of the Sioux Tribe of Indians belonging on the Rosebud Reservation who is living at the time of the passage and approval of this act and who has not heretofore received an allotment:[1] *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged.[2]

SEC. 3. That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have opened for settlement and entry, four dollars and fifty cents per acre; after the expiration of six months after the

same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. The price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the same price that it was first entered:[3] *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments pre-
[308] viously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price.

SEC. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

SEC. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and dispo-

sition of the lands as aforesaid shall be deposited in the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an application by a majority of said Indians, pay a portion of the same to the Indians in cash, per capita, share and share alike, if in his opinion such payments will be for the best interests of said Indians.

SEC. 6. That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

SEC. 7. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and sixty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section six of this act. And there is hereby appropriated the further
[309] sum of fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of making the allotments provided for herein: *Provided*, That the same shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Rosebud Indians.

SEC. 8. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided: *Provided*, That nothing in this act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

Approved, March 2, 1907.

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[1] 40 L. D., 6. [2] 40 L. D., 54. [3] 41 L. D., 128, 636.

APPENDIX C-3

[Act of May 30, 1910, c. 260, 36 Stat. 443, 3 Kappler 459]

[459] CHAP. 260.—An act to authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh Counties in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian Reservations, thence south along the boundary line between said reservations to the township line separating townships thirty-nine and forty, thence east along said township line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: *Provided*, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: *And provided further*, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: *And provided further*, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be

disposed of as prescribed herein shall have been completed: *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and
[460] four and twenty-three hundred and five of the Revised Statutes as amended by the act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or in improvements within the town sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements, shall be credited to the Indians, as hereinafter provided.

SEC. 4. That the price of said lands entered as homesteads under the provisions of this act shall be fixed by appraisement, as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this act. In making such classification and appraisement said lands shall be divided into the following classes: First

agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: *Provided*, That timber lands may be classified without regard to acreage: *And provided further*, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisement of said lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

SEC. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior; and after the completion
[461] of the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this act.

SEC. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

SEC. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

[462] SEC. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

SEC. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

SEC. 11. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

Approved, May 30, 1910.

APPENDIX D

Surplus Land Statutes Enacted 1904-1913

		Reservation Population*	Enrollment*
1. Red Lake, Minn.	2/20/04, c. 161, 33 Stat. 46	2,737	4,774
2. Rosebud, S.D.	4/23/04, c. 1484, 33 Stat. 254	7,181	9,400
3, Flathead, Mont.	4/23/04, c. 1495, 33 Stat. 302	2,825	5,296
4. Devils Lake, N.D.	4/27/04, c. 1620, 33 Stat. 319	1,748	1,629
5. Crow, Mont.	4/27/04, c. 1624, 33 Stat. 352	3,842	4,828
6. Grande Ronde, Ore.	4/28/04, c. 1820, 33 Stat. 567	**	**
7. Yakima, Wash.	12/21/04, c. 22, 33 Stat. 595	7,010	5,391
8. Wind River, Wyo.	3/3/05, c. 1452, 35 Stat. 458	4,062	4,594
9. Colville, Wash.	3/22/06, c. 1126, 34 Stat 80	2,949	4,953
(Held not to terminate reservation status in *Seymour v. Superintendent*, 368 U.S. 351 (1962))			
10. Lower Brule, S.D.	4/21/06, c. 1645, 34 Stat. 124	581	296
11. Coeur D'Alene, Idaho	6/21/06, c. 3504, 34 Stat. 334	523	523
12. Blackfeet, Mont.	3/1/07, c. 2285, 34 Stat. 1035	6,220	10,467
13. Rosebud, S.D.	3/2/07, c. 2536, 34 Stat. 1230	—	—
14. Spokane, Wash.	5/29/08, c. 217, 35 Stat. 458	600	1,500
15. Cheyenne R., S.D.	5/29/08, c. 218, 35 Stat. 460	4,236	5,993
(Held not to terminate reservation status in *United States ex. rel. Condon v. Erickson*, 478 F.2d 684 (C.A. 8, 1973))			
16. St. Rock, N.D., S.D.	5/29/08, c. 218, 35 Stat. 460	4,712	7,131
17. Fort Peck, Mont.	5/30/08, c. 237, 35 Stat. 558	6,000	5,674
18. Pine Ridge, S.D.	5/27/10, c. 257, 36 Stat. 440	11,151	13,813
19. Rosebud, S.D.	5/30/10, c. 260, 36 Stat. 448	—	—
20. Ft. Berthold, N.D.	6/1/10, c. 264, 36 Stat. 455	2,677	3,709
(Held not to terminate reservation status in *City of New Town v. United States*, 454 F.2d 121 (C.A. 8, 1972))			
21. St. Rock, N.D., S.D.	2/14/13, c. 54, 37 Stat. 675	—	—
(Held not to terminate reservation status in *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (1972))			
	TOTALS:	69,054	89,971

* *Federal and State Indian Reservations*, pp. 131, 180, 189, 191, 193, 197-198, 316, 317-318, 330, 335, 337, 339, 343, 359, 387, 393-394, 415-416.

** Terminated. Act of August 13, 1954, c. 733, sec. 2, 68 Stat. 724 (25 U.S.C. 691 *et seq.*)

APPENDIX E

Excerpts From Materials Relating to the History of the Rosebud Surplus Land Acts

1. Excerpts From Council Proceedings Conducted by Inspector McLaughlin at Rosebud, South Dakota, July 24, 25, 29, 30, and August 7, 8, 10 1903, N.A. Record Group No. 48, Records of the Office of the Secretary of the Interior, Indian Division

[Aug. 8, 1903, p. 389]—Hollow Horn Bear: We are Indians yet, and we remember the laws that have been made for us. The Great Father has made a law that there must be three-fourths of the people consenting before any action shall be taken by Congress. If they will consider that law, they should not open that Gregory County without our consent. If they do, I shall feel like a prisoner in my own country.

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2. Excerpts From Report Dated August 31, 1903, Inspector McLaughlin to Secretary of the Interior, pp. 2-3, N.A. Record Group No. 48, Records of the Office of the Secretary of the Interior, Indian Division

[2] On August 8th I submitted the agreement, herewith transmitted, [3] and invited those assenting to come forward and sign it; and notwithstanding that the council was dominated by the more active opponents of the proposition, 90 signatures were at once obtained, leaving only about 35 of those present who refused to concur.

This large percentage of the assemblage assenting to the provisions of the new agreement, together with the message delivered me by the lieutenant of police from persons favoring the agreement who had returned to their homes, encouraged me sufficiently to make a tour of the several districts of the Reservation, and meet the Indians of the different settlements at the headquarters of their respective districts. I travelled by team about 400 miles over the Reservation, 100 miles through the districts west of the Agency and about 300 miles in the districts east of the Agency, visiting them in the following order:—Spring Creek, Upper Cut Meat, Cut Meat Issue Station, Black Pipe, Little White River, Butte Creek, Big White River, Bull Creek and Ponca Creek,—thus consuming sixteen days, during which time I explained every feature of the agreement at the nine different points above stated, at each of which district headquarters I received quite a number of signatures, a total of 737, which number, whilst being 48 more than half of the male adult Indians of the Reservation, is 296 less than the required three-fourths majority.

Excerpt From Instructions Dated December 5, 1906, Commissioner of Indian Affairs to Inspector McLaughlin, N.A. Group No. 75, Bureau of Indian Affairs, Land Division, Letter Book 917

3. [1] Sir: The Office is in receipt of a letter of November 26, 1906, from the First Assistant Secretary of the Interior, referring to Office communications of June 4 and November 23, 1906, concerning the recommendation of Senator Gamble that an inspector be detailed to enter into negotiations with the Rosebud Indians for the cession of the surplus unallotted land in Tripp County, South Dakota, and say that you are now at liberty to take up this work.

* * * * *

The lands referred to are embraced in townships [Here follows the land description]

[2] * * * The Annual Report of this Office for 1905 shows the unallotted lands of the reservation to be 1,616,407 acres. The lands above described embrace according to approximate estimate 1,094,000 acres, of which there has been allotted about 187,000 acres, leaving a surplus of some 907,000 acres.

* * * * *

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4. [10] It is but right to the Indians also that you should explain to them with great particularity that the law as defined by the Supreme Court of the United States, our highest and final tribunal, vests in Congress the right to open their lands without their consent; that the desire of the Department in sending you to talk the matter over with the Indians is to obtain from them their views of the terms on which the opening ought to be made; and that it will doubtless be to their advantage to enter into an agreement containing such reasonable provisions as they think would be most beneficial to them as a tribe.

Excerpt From Council Proceedings Conducted by Inspector McLaughlin at Rosebud, South Dakota, December 14, 15, 18, 20, 1906 and January 17, 18, 21, 1907, N.A. Record Group 75, Letters Received 1881-1907, 17495-Land-1907 (The full text is set out in App. III, pp. 176-269 in the court below)

5. [Sat., Dec. 15, 1906, p. 13] RALPH EAGLE FEATHER: You came to ask the whole people some questions. What the people want they have put in writing.

A very little question I want to put to you here. At the time you came here and made a treaty for our Gregory County lands, you mentioned five years' payments to us at the time. You said that every person would get $30.50 annually. Now, my friend, we respect you a good deal because you belong to the tribe, married into our nation, that is the reason we respect you a good deal. You know that. What we wanted and what you wanted we accomplished in full at the time, but you have not fulfilled your promises. You know that, we know it. We did not get any $30.50 per head yearly from that treaty. * * *.

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6. [Dec. 15, 1906, p. 15, McLaughlin] I can positively promise you that, in case we reach an agreement, it will provide for the allotment of lands to all children born since March 3, 1899, and they may be allotted in Tripp County and before the lands are opened.

* * * * *

[p. 17] You ask that those entitled to allotments, but have not yet taken them, be allotted, of which there are about 80 in all. In answer to that I will say there will be no difficulty in that. All beneficiaries of the reservation who have not yet received allotments can be allotted before Tripp County is opened to settlement, and they can take them anywhere on the reservation, including Tripp County. There will be a provision in the agreement to that effect.

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7. [Dec. 15, 1906, p. 23] RALPH EAGLE FEATHER: My friend, this is our wishes to have $5 per acre and we put that in writing. * * * Here is the treaty we made with you in 1901 which you have stepped over and now you want more land again, the land we depend on in the

future. We want to get full pay for the land we sold you and something to eat from it. We are saving that Tripp County land for ourselves. The terms made in that Gregory County Agreement have not been fulfilled and have been changed. Somebody has held it back. * * *.

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8. [Dec. 15, 1906, p. 25] STRANGER HORSE: Now we have judged and put all we want in writing and given it to you.

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9. [Wed., Dec. 16, 1906, p. 28] RED BULL: I want to say a few words before Hollow horn Bear makes his speech. Some of us have given Hollow horn power to speak for us and we have the names on this paper for whom he will speak.

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10. HOLLOW HORN BEAR: * * * Before I arrived, my friends here wrote something on paper and presented it to you. The people over 18 years of age who live with me have given me the power to speak for them. If they had not given me that power, I would not be occupying the floor and making this talk. * * * [29] The Great Father wants us to make an agreement. I want $5 per acre for the entire tract and I want the Great Father to pay for it. I want the Great Father's council to pay for this land at $5 per acre straight, to guarantee it. * * * I want the money to be placed in the U.S. Treasury the same as former treaties were made. I want to say one thing more. In the Gregory County land that we sold, we missed one issue of cows and lost a calf from each cow by it. In the second year we lost the increase of the calf

again. We want the Great Father to pay for those calves which we lost. The value of the calves is $5 per head. I want to say that if this is to become a law, we want our children who have no land to first have allotments.

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11. [Dec. 18, 1906, p. 35] INSPECTOR McLAUGHLIN. * * *. You have an opportunity to be a party to an agreement for the opening of your Tripp County unallotted lands, and having explained it repeatedly, you must all know that the right is vested in Congress to open Indian lands without the consent of the Indians. * * *.

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12. [December 18, 1906, pp. 41-42] INSPECTOR McLAUGHLIN: In reply to my friend Stranger Horse, I will say that I wish to have you fully understand without any mistake about it, that the allotment of the children, as also allotments to those who have not yet received allotments and to persons whose present allotments are to be relinquished and other allotments made to them instead, will be provided for in any agreement that we may enter into and that before Tripp County is opened. That will be distinctly understood, and the privilege of taking their allotments within the boundaries of Tripp County will be provided for in the agreement.

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13. [Jan. 17, 1907, p. 2] INSPECTOR McLAUGHLIN. * * *. He was very pleased and commended the judgment of you people very highly in your desire to provide for an interest bearing fund of one million dollars and said that while 5% interest was a very high rate of interest on such a deposit, more than has been allowed on similar deposits for some time past, he would do

everything he could toward having it accepted, and Congressman Burke, who is the author of the House Bill for opening Tripp County, and a member of the committee on Indian Affairs, also said that he would do everything in his power to meet your wishes in this respect. The allotments for all of your children who have been born since allotments were completed will be provided for as you already understand, and will be made a part of any agreement that we may conclude, and Indians who have undesirable allotments will be permitted to relinquish them and take other allotments in lieu thereof on any unoccupied lands of the reservation including Tripp County.

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14. [p. 5] As I stated to you before that both the Commissioner and Mr. Burke, who are determined to do the very best they can in protecting your interests, feel that the $2.50 per acre for your school lands is all that can be reasonably demanded, and that it would be futile to urge for a higher price. There is now very little difference between us. I am ready to incorporate the depositing a million dollars at 5% interest and the petitioning to the Department through your Agent as to what disposition in the way of purchases you may wish to make from the remaining proceeds as received. As to reallotting those who have poor allotments and to children who have no allotments, that will be made a part of the agreement.

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15. [Jan. 18, 1907, p. 13] INSPECTOR McLAUGHLIN: The acreage of Tripp County is a little over a million acres, 1,094,000 acres, about 138,000 acres of

which has been allotted, leaving about 907,000 acres unallotted as it now stands. When the children, and those who desire to change their [14] allotments are allotted, should they select lands in Tripp County, it will reduce the acreage greatly. A specific number of acres will not be stipulated in the agreement, simply all lands that are left after the allotments are made, are to be disposed of, as provided in the Bill.

HOLLOW HORN BEAR: I tried to see the agent this morning and ask him how many people are entitled to allotments, but he was so busy I could not do so.

AGENT KELLEY: I think there is probably six or seven hundred.

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16. [Jan. 18, 1907, p. 15] HOLLOW HORN BEAR: You also said that you were afraid that the Burke Bill would become a law if we did not consent to it.

INSPECTOR McLAUGHLIN: I did.

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17. [Jan. 18, 1907, p. 36] INSPECTOR McLAUGHLIN. * * *. We might just as well try to swim up your Rosebud Creek in the spring when deep snows in the hills are melting, and when the water rushes down like a torrent and carries everything before it, as to try to keep back settlement of unoccupied lands. Do not think, my friends, that I am speaking in a way threatening you or trying to force you, as such is far from my intentions. I regard it my duty as a friend of the Indian and as a representative of the Government, to tell you the facts just as I know them, believing that your Tripp County lands will be opened to settlement whether you consent to it or not, and I would wish you to be a party to the

transaction by you people consenting to the reasonable proposition which I have presented.

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18. [Jan. 18, 1907, p. 37] TODD SMITH. * * * My friend, this is the last thing I want to say to you. You have made a coward out of the people on the Rosebud Reservation, and the reason why I say that is this. You say to us if we do not do this it is going to be made a law anyhow.

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19. Letter dated February 12, 1907, Inspector McLaughlin to Secretary of the Interior, N.A. Record Group 75, Bureau of Indian Affairs, Letters Received 1881-1907, 17945-Land-1907

Sir:

* * * * *

After a full discussion of the different propositions, I prepared the agreement embracing the provisions as agreed upon, which, after being read and explained to the Indians assembled, was accepted and the agreement was immediately signed by 43 Indians of those present. Then, in order to obtain the required number of signatures and make it unnecessary for the Indians to travel long distances from their homes to the Agency for that purpose in the cold weather, I visited the headquarters of the several districts of the reservation where the Indians of the respective districts met me, thus visiting Spring Creek, Cut Meat, Butte Creek, Bad Nation, Big White River, Bull Creek, and Ponca Creek stations, at which points I explained the provisions of the agreement to the Indians assembled and received the signatures of all concurring in the agreement.

20. Letter Dated April 2, 1909 From the First Assistant Secretary of the Interior to Inspector McLaughlin, N.A. Record Group 75, Bureau of Indian Affairs, Central File 1907-39, File 24400-09-3081, Pine Ridge

Sir:

You are hereby directed to take up with the Indians of the Pine Ridge and Rosebud Reservations the matter of opening parts of these reservations to settlement and entry, bills for which were pending before the last Congress.

There are enclosed herewith, for your information and use in connection with this matter, copies of the bills together with printed reports thereon, which embody the recommendations made by this Department when the bills were submitted here for report and recommendation.

Submit a separate report covering the provisions of each of the two bills, together with such recommendations as you care to make.

Excerpts From Proceedings of Councils Held By Inspector McLaughlin with Indians of the Rosebud Reservation

21. [April 21, 1909, p. 2] INSPECTOR McLAUGHLIN: * * * I am here again under orders of the Secretary of the Interior to present to you the question of opening to settlement the surplus lands of a certain part of your reservation as contemplated by a bill introduced by Senator Gamble on December 9th last, and you have been assembled here in council today that I may explain to you this pending legislation.

* * * * *

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22. [p. 3] Several of your people, who were in attendance at that conference, expressed themselves as opposed to the opening of any more of your reservation and stated that a delegation of your people had but recently returned from Washington where they had met the Indian Commissioner and Senator Gamble to whom they had protested against the opening of any more of your lands.

* * * * *

[p. 3] My friends, this is the fifth time that I have negotiated with you for lands, and have been here so often with reference to the cession of lands, that my friend, High Pipe, has given me the name of "The man who bothers his friends for more land."

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23. [p. 4] I have now explained the provisions of the bill so clearly that all present should understand it, and when considering the proposition you should not forget that the law, as defined by the Supreme Court, vests in Congress the power to open the surplus lands of Indian reservations without the consent of the Indians, and you are all aware of this power of Congress, it having been fully explained to you in previous negotiations of these past few years.

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24. [April 26, 1909, p. 15] INSPECTOR McLAUGHLIN: * * * I am not here to ask you to touch the pen or make any agreement at this time. This requirement has been discontinued since the Supreme Court defined the law that Congress had the power to open any Indian reservation without the Indians' consent. * * *.

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25. [p. 18] TURNING BEAR: My friend, this is the fourth time that we see you. Look at me. I am one of your treaty men. I have honored the Great Father and I am one that has always worked for the Great Father. Whenever there has been trouble and it was smoky, the agent sends me to get the people that are making trouble and I get them. I have helped the Great Father in every way that I could. But now I do not think that this law that he is going to make is good. He wants to take our land without making a treaty with us. This is what I do not believe in. We want you to go back to the Great Father and tell him that this land is ours and if we do not get what we want we will not touch the pen or make the treaty.

26. Excerpt from General Accounting Office Report, Vol. 3, p. 1653, filed July 12, 1934, in Sioux Tribe v. United States, No. C-531 in the Court of Claims

An examination of the township plats of survey and tract books on file in the General Land Office discloses that the area of the lands within the boundaries defined by Section 1 of the aforesaid act of March 2, 1907, was 1,083,680.11 acres (see Exhibit A, tracts Nos. 5, 17, 27, 33, and 165; also, Sectionized map of Rosebud Indian lands opened by the act of March 2, 1907, General Land Office files), the status of which, as of June 30, 1925, was as follows:

	Acres
Total area affected by the act of March 2, 1907	1,083,680.11
Indian allotments (Sections 1 and 2 of said act)	406,081.75
Disposed of to entrymen	573,797.87

Disposed of by public sale			37,516.38
State school lands:			
Sections 16 and 36 of each township (Section 6 of said act)	53,130.80		
Indemnity selections (Section 6 of said act)	11,455.17		64,585.97
Reserves:			
Missionary	205.00		
Agency	412.44	(a)	617.44
Town sites: (Section 4 of said act)			
Wamblee	160.00		
Wewela	160.00		
Minneota	320.00		
Witten	320.00		960.00
Vacant (subject to entry), as of June 30, 1925			120.70
			1,083,680.11

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27. Excerpt from General Accounting Office Report, Vol. 3, pp. 1707-1708, filed July 12, 1934, in Sioux Tribe v. United States, No. C-531 in the Court of Claims

[1707] An examination of the township plats of survey and tract books on file in the General Land Office discloses that the lands described in Section 1 of the aforesaid act of May 30, 1910, are embraced within the present boundaries of Mellette County, South Dakota (see Session Laws, South Dakota, 1911, page 138; also Exhibit A, Tract No. 28; also map of Rosebud Reservation, South Dakota, showing lands to be opened to settlement under the President's proclamation of June

29, 1911), and embrace a total area of 837,125.78 acres, the status of which, as of June 30, 1925, was as follows:

		Acres
Total area affected by the act of May 30, 1910		837,125.78
Indian allotments (Sec. 1 of said act)		514,509.53
State School lands:		
Sections 16 and 36 of each township (Sec. 8 of said act)	19,114.04	
Indemnity selections (Sec. 8 of said act)	30,565.99	
		49,680.03
[1708] Disposed of to entrymen		265,770.56
Reserves: (Sec. 1 of said act)		
Missionary	1,370.48	
Cemetery sites	10.00	
Day school	886.64	
Agency (issue stations)	1,099.29	(a) 3,366.41
Vacant (subject to entry), as of June 30, 1925		3,799.25
		837,125.78

28. Pertinent Excerpt From Slip Opinion Filed August 1, 1975 in State of South Dakota v. Whitehorse, No. 11319-a-JMD in the Supreme Court of South Dakota

[p. 6] In State v. Molash, 86 S.D. 558, 199 N.W.2d 591, we found that the Standing Rock Reservation was not disestablished by the Act of 1913 (37 Stat. 675). This Act is strikingly similar to the Act of 1907 herein involved in this case. Both Acts use the language "to sell or dispose of all that portion of (naming the reservation)" and go on to describe a contiguous tract of land on those reservations. Both Acts provide for the land to be sold and the money derived therefrom to be held in trust for the Indians, and for the allotment of lands to each Indian who has not been allotted before the sale was made. It should be noted that at the time this court decided State v. Molash, supra, we did not have the benefit of the comprehensive citations leading to an analysis of the "legislative history" and "surrounding circumstances" from which the intent of Congress could be established when it passed the Act dealing with the Standing Rock Reservation. Thus the case was decided on the wording of the 1913 treaty as interpreted in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, and The City of New Town, North Dakota v. [p. 7] United States, 8 Cir., 454 F.2d 121. Rosebud Sioux Tribe v. Kneip, supra, disposed of the Seymour and New Town cases in the following language:

> "Cases where the congressional intent 'was that the reservation should continue to exist as such,' *Seymour, supra* p. 355, or *New Town, supra,* where the court was unable to find a congressional intent to disestablish are not, of course, inconsistent with the result we have reached. For (as will be fully developed herein), the defendants before us have

demonstrated that a congressional determination to terminate lay behind each of the Acts in question."

We also suggested in State v. Molash, supra, that certiorari be requested to determine the question therein presented.

Whether State v. Molash, supra, can withstand the scrutiny of the intent expressed by Congress at that time or the circumstances surrounding the enactment of the Act of 1913 remains for future decisions.

APPENDIX F

Comparison of the 1901 Agreement and the 1904 Act

The court of appeals thought that the 1904 Act "amended the 1901 Agreement solely with respect to the method of payment." (App. A, p. 23.) The facts are to the contrary.

First, under Article I of the 1901 Agreement (App. C-1, p. 115), the Indians sold. The sale was not ratified so that it never took place. The court below disregarded this.

Second, under Article II of the 1901 Agreement (App. C-1, p. 115), the United States bought the land and agreed to pay $1,040,000 for it. As amended by the 1904 Act, the United States did not buy and did not agree to pay anything. If none of the land had been sold, the Indians would have received nothing. The last section of the 1904 Act spelled out that the United States had no obligation to buy, or to find buyers for, the land. This was not a change in "method of payment." This was a repudiation of any notion that the United States might pay. Yet, the entire concept of the court of appeals rests on this erroneous premise.

Third, under Article III of the 1901 Agreement (App. C-1, p. 115-116), the United States agreed that out of the purchase price of $1,040,000, $250,000 was to be expended for cattle to be distributed as soon as practicable after ratification, and the balance of $790,000 was to be paid per capita in five annual installments of $158,000 each, the first within four months after ratification.

As amended by the 1904 Act, the $250,000 for cattle would never be expended unless "derived from the sale of

lands." The 1904 Act made no reference as to when such cattle might be distributed, since there could be no guarantee as to when $250,000 would be available, particularly since not more than one-half of the uncertain proceeds of sale could be spent for cattle in any one year. Instead of a guaranteed distribution of $158,000 per capita for each of five years, under the Act not more than one-half of the proceeds received in any one year could be paid per capita. The court of appeals saw no difference. To the Indians the failure to receive their cattle was a source of complaint.

Fourth, under Article VI, the 1901 Agreement was not effective until "signed" by three-fourths of the male adults. The 1904 Act eliminated this article. *Lone Wolf* holds the statute constitutional without Indian consent. *Lone Wolf* does not hold that there can be an effective agreement or contract without mutual consent. Yet, the court of appeals treated the unratified agreement as if it were a binding contract.

Fifth, the 1904 Act (sec. 2) reserved land for agency, school and religious purposes. The 1901 Agreement did not. The court of appeals saw no significance in this.

Sixth, the 1904 Act was an outright acquisition of the school sections for a sum certain (secs. 4, 5) and the donation of those sections to the State. The 1901 Agreement makes no reference to school sections. The court of appeals saw no difference.

Seventh, in the 1901 Agreement, the United States was the buyer for $1,040,000. The 1904 Act (sec. 6) affirmatively specified that the statute did not "bind the United States to purchase" any land except the school land, or "to guarantee to find purchasers" or to do anything except "act as trustee * * * to dispose of said land and to

expend and pay over the proceeds * * * as received." The court of appeals ignored this.

The court of appeals made a fundamental error when it adopted the view that the 1904 Act did nothing but amend the "method of payment" in the 1901 Agreement, and concluded that the Act extinguished Indian title.